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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

AG SERVICES OF AMERICA, INC.,
Petitioner,

v.

JOHN D. NIELSEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A jury found defendant not to be liable to plaintiff on conversion, fraud and negligent misrepresentation claims in a general verdict. A district judgment then granted plaintiff equitable relief against defendant on several separate and distinct equitable claims. The Court of Appeals reversed, holding that the general jury verdict precluded liability on the equitable theories presented.

1. Does the right to a jury trial provided in the Seventh Amendment of the United States Constitution preclude the trial court from granting equitable relief on claims of *quantum meruit*, improper preference to corporate officer and piercing the corporate veil where a jury decided legal conversion, fraud and negligent misrepresentation claims in defendants' favor in a general verdict?

2. May a Seventh Amendment right to a jury trial be waived as to common issues of fact underlying both legal and equitable claims?

3. Does liability for partnership by estoppel require that credit be given or extended to a separate partnership entity?

PARTIES TO THE PROCEEDING

Petitioner

Ag Services of America, Inc.

Respondent

John D. Nielsen.

In addition, Diamond Hill Farms, Clovis, Inc. was a party in the Court of Appeals proceeding. Diamond Hill Farms, Clovis, Inc. was a defendant and Terry Lundell was named as a third-party defendant in the district court proceeding.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Ag Services of America, Inc. has no parent corporation and no publicly held company owns 10% of its stock.

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Ag Services of America, Inc. ("Ag Services") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Ag Services of America, Inc., an Iowa corporation v. John D. Nielsen and Diamond Hill Farms, Clovis, Inc., a New Mexico corporation*, No. 99-2081, is set forth in the Appendix hereto. (App. at 1a-25a.)

The opinion of rehearing of the United States Court of Appeals for the Tenth Circuit in *Ag Services of America, Inc., an Iowa corporation v. John D. Nielsen and Diamond Hill Farms, Clovis, Inc., a New Mexico corporation*, No. 99-2081 is set forth in the Appendix hereto. (App. at 52a-55a.)

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit reversing the district court's final judgment was entered December 18, 2000. A *Petition for Rehearing* was denied by *Order on Rehearing* entered December 18, 2000. This Petition for Writ of Certiorari is filed within ninety days from that date, pursuant to Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). The United States District Court of New Mexico had jurisdiction pursuant to 28 U.S.C. § 1332, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

NMSA 1978, § 54-1-16A; Partnership by estoppel; states in pertinent part:

> When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him or anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, . . .
>
> (1) When a partnership liability results, he is liable as though he were an actual member of the partnership.
>
> (2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

STATEMENT OF THE CASE

This case arises from an $800,000 agricultural loan made by petitioner Ag Services to Terry Lundell ("Lundell") for growing potatoes on a large farm Lundell leased in eastern New Mexico. The loan was originally made to Lundell on January 12, 1992. As a condition of approving the loan, Ag Services required Lundell to obtain advance potato contracts and the management assistance of someone with experience in potato farming, because Lundell had little such experience. John Nielsen ("Nielsen") was a well-known expert potato farmer who conducted business personally under the trade name "Diamond Hill Farms," and had a longstanding business relationship with Frito-Lay, a large potato purchaser. Lundell obtained Nielsen's assistance and commitment to manage the potato farm and to obtain advanced potato contracts with Frito-Lay, Inc. Nielsen and Lundell both confirmed this with Ag Services, who then approved the loan.

Unbeknownst to Ag Services, Lundell and Nielsen formed a purported corporation on or about February 24, 1992 to grow and market the potatoes, Diamond Hill Farms, Clovis, Inc. ("DHFC"). Ag Services advanced land rental, seed potatoes, fertilizer, chemicals and other products worth $611,393 from January 1992 through June 1992, all of which were used by DHFC to grow the potatoes. DHFC carried Ag Services' supplies and advances as an account payable on its books and records and made $50,000 in payments to Ag Services on the account. Potatoes were harvested in July and August 1992, and over $2 million in proceeds were subsequently received by DHFC and by Nielsen, personally. Ag Services' outstanding account and loan went unpaid, even though Nielsen personally kept $323,352.72 of proceeds received from Frito-Lay and $89,000.00 worth of potato packing material of the business.

Ag Services sued Lundell on the unpaid note in Iowa State District Court and obtained a judgment against him, which judgment remained substantially unsatisfied. During the course of that litigation, Lundell advised Ag Services that Nielsen had received some of the potato proceeds. Ag Services then sued the insolvent DHFC for conversion and sued Nielsen, individually, in the United States District Court for the District for New Mexico which led to the instant appeal. Ag Services asserted a number of legal claims against Nielsen, including conversion, fraud and misrepresentation and sought damages in the amount of $691,000, plus interest. Ag Services also asserted separate equitable claims of *quantum meruit*, improper preference to a corporate officer, partnership by estoppel and piercing the corporate veil and sought equitable remedies, including restitution and disgourgement of improper preferences. Nielsen filed a jury demand. Ag Services moved to strike the jury demand with respect to the equitable claims. The parties subsequently agreed that the equitable issues of *quantum meruit*, piercing the corporate veil and partnership by estoppel "should be tried to the court," and each side submitted numerous proposed findings of fact and conclusions of law on those issues both prior to and after trial. (*See* App. at 43a-51a.)

After a seven-day jury trial, the jury found in favor of Nielsen on all of the legal claims, but against DHFC in the amount of $162,000 on the conversion claim. The trial court subsequently considered the remaining equitable claims and found Nielsen liable for claims of *quantum meruit*, improper preference, partnership by estoppel and piercing the corporate veil. (*See* App. at 28a-42a.) The trial court awarded restitution from Nielsen to Ag Services of the $323,352 Frito-Lay proceeds, plus the $89,000 packing inventory, plus prejudgment and post-judgment interest for a total verdict of approximately $750,000. (App. at 26a-27a.) Nielsen

appealed to the Tenth Circuit Court of Appeals, while Ag Services, being the winning party, did not appeal.

In its *Opinion*, the Court of Appeals found that the Seventh Amendment was "dispositive" of the case and the general jury verdict in favor of Nielsen precluded judgment against Nielsen on any of the equitable theories presented. (*Opinion*, App. at 8a, 25a.) The Court of Appeals directed the trial court to enter judgment in favor of Nielsen on all claims based upon the jury verdict. (*Opinion*, App. at 25a.)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S AWARD OF RESTITUTION IN *QUANTUM MERUIT*, IMPROPER PREFERENCE AND PIERCING THE CORPORATE VEIL.

Trial courts are increasingly embroiled in cases involving the joinder of legal and equitable causes of action where a jury trial is requested. Although it is clear that the Seventh Amendment requires traditional legal causes to be tried before a jury, the Seventh Amendment does not create an equal right to have traditional equitable claims for relief determined by a jury. In this case, the trial court awarded petitioner Ag Services restitution in *quantum meruit*, as follows:

> 36. Ag Services is entitled to damages in *quantum meruit* because Nielsen knew of Ag Services' loan and expectation of repayment of its loan, yet Nielsen wrongfully kept the $323,352.72 of proceeds from the business, and the $89,000.00 worth of packing inventory. Nielsen is not entitled to retain

> those benefits, even if Ag Services' security agreement with Lundell is invalid as to some of the acreage due to a mistaken legal description in the Security Agreement or because of multiple subleases of the farm land or due to the formation of Diamond Hill Farms, Clovis, Inc. during the season or for other reasons.

(App. at 38a-39a.)

The Court of Appeals reversed the trial court's award of equitable relief in *quantum meruit* on the grounds the award conflicted with the jury's possible implicit findings and thus violated Nielsen's Seventh Amendment right to a jury trial.[1] (*Opinion*, App. at 14a, 16a, 17a.) The Court held that Seventh Amendment based issue preclusion broadly applies to include those implied factual issues that the jury may have *possibly* decided in reaching its general verdict and that the trial court may not issue any findings that conflicted with the jury's possible implicit findings. (*Opinion*, App. at 9a-11a.) The trial court found Nielsen formed DHFC for several improper purposes, including avoidance of existing debts and obligations and to impair Ag Services' security interest in the potatoes at issue. (*Findings* 13, 36, App. at 32a, 38a.) The Court of Appeals determined that the trial court's "improper corporate purpose" findings implicitly conflicted with the jury verdict, because the jury was instructed, "if an officer or

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[1] Ag Services also maintains that Nielsen waived whatever right he had to a jury trial of the equitable issues, because the parties agreed that the *quantum meruit*, piercing the corporate veil and partnership by estoppel causes of action "are equitable and to be tried to the Court." (App. at 43a-44a.) Consequently, the Seventh Amendment does not apply to these claims. See Point II, below.

director directs or actively participates in the commission of the tortious act of the corporation including conversion, then he will be liable, along with the corporation," and the jury found DHFC liable for $162,000 in conversion, but not Nielsen. (*Opinion*, App. at 14a, 16a.) The Court reasoned that the jury implicitly "did not find Nielsen formed the corporation in order to impair Ag Services' security interest, because if it had, it would have found Nielsen had converted the Frito-Lay proceeds," and concluded that the jury's general verdict thus precluded the trial court from finding any "possible wrongdoing by Nielsen on which liability might have been properly based in equity." (*Opinion*, App. at 14a and 8a-11a.) The Court of Appeals based its decision upon this Court's prior opinions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552-53 (1990).

A. The Court of Appeals misapplied the law of Seventh Amendment based issue preclusion.

This Court has held that the Seventh Amendment requires "when legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Lytle*, 494 U.S. at 550. In applying this rule, the Court of Appeals determined that the trial court, in granting equitable relief, is bound by all of the possible implicit findings made by the jury in reaching its general verdict and could not enter any findings that conflict with the jury's possible implicit findings. (*Opinion*, App. at 9a-11a.) In doing so, the Court of Appeals erroneously applied the issue preclusion doctrine.

Issue preclusion generally applies to preclude relitigation of issues (1) that were necessarily and actually decided by the

jury in the first case, and (2) where there was a full and fair opportunity to litigate the issue in the prior proceeding. *Haring v. Prosise*, 462 U.S. 306, 318-19 (1983). "Issue preclusion attaches only to determinations that were necessary to support the judgment entered in the first action." *Schiro v. Farley*, 510 U.S. 222, 233 (1994), *citing* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4421, p. 192 (2d ed. 1981). This Court has interpreted the "necessity" requirement to require a determination of whether a rational jury could have grounded its verdict upon an issue *other* than the issue sought to be foreclosed. *Id.*; *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Where there were "any number of possible explanations for the jury acquittal verdict, then the 'necessity' element of issue preclusion has not been satisfied." *Schiro*, 510 U.S. at 233. This is in accordance with the rule adopted by most other Circuits and the general rule stated in *Restatement (Second) of Judgments* § 27 cmt. i (1982), which provides: "Where a judgment is based upon determinations of two issues, either of which would be sufficient to support the result, then the judgment is *not* conclusive with respect to either issue standing alone."[2] Where there is doubt as to

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[2] Most other Circuits hold that issue preclusion does not apply to all of the issues that a jury could *possibly* but not necessarily have decided in reaching a general verdict. *See, e.g., Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 728-29 (2nd Cir. 1981) (that general verdict for defendant could have rested on any of three issues could not support preclusion); *Board of County Supervisors v. Scottish & York Inc. Serv. Ins*, 763 F.2d 176, 179 (4th Cir. 1985) ("we cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict"); *Chew v. Gates*, 27 F.3d 1432, 1438-39 (9th Cir. 1994) (speculation as to various possible grounds of jury verdict will not support application of collateral estoppel); *In re Held*, 734 F.2d 628 (11th Cir. 1984) (jury verdict that could have found defendant's conversion of necklace was either "willful and malicious" or "recklessly indifferent" was *not*

whether an issue has been actually and necessarily determined, then issue preclusion should not be applied. *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1519 (9th Cir. 1985). The burden is on the party seeking to apply issue preclusion that the factual issue has been actually decided and necessarily resolved by the jury. *Dowling v. United States*, 493 U.S. 342, 350-51 (1990).

B. The jury could not conclusively determine "wrongdoing" for purposes of *quantum meruit*.

At the outset, the Court of Appeals erred in determining that the jury implicitly "actually and necessarily determined" the kind of "wrongdoing" at issue for purposes of *quantum meruit* and that its implicit determination was conclusively binding in equity under the guise of the Seventh Amendment. (*See Opinion*, App. at 14a, 17a, 25a.) The jury here did not actually and necessarily absolve Nielsen of all wrongdoing and the jury would not have actually and necessarily determined the kind of wrongdoing, inequity or unconscionable result at issue in *quantum meruit* or the other equitable claims, in any event. *Markham v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) holds that the Seventh Amendment requires a determination of which "issues are proper for the jury, when possible, by using the historical method, much as we do in characterizing the suits and actions within which [the issues] arise." *Id.* at 378. The Seventh Amendment right to a jury trial does not apply to causes of action customarily heard by Courts of Chancery in the late 18th century. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708, 119 S.Ct. 1624, 1637 (1999).

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preclusive as to either finding).

Quantum meruit or unjust enrichment is an ancient equitable cause of action historically available in Chancery where a person has been unjustly enriched at the expense of another and equity requires the enriched person to make restitution. *See Moses v. MacFerlan*, 2 Burr, 1006 (1760) (Lord Mansfield wrote in 1760: "In one word, the gist of this kind of action, is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money").[3] The New Mexico Supreme Court recently summarized *quantum meruit* in *Ontiveros Insulation Co. v. Sanchez*, 129 N.M. 200, 3 P.3d 695 (Ct. App. 2000) as follows:

> Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules or the absence of precedents. It looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. And once rightfully possessed of a case it will not relinquish it short of doing complete justice. It weighs the equities between the parties and adopts various devices to protect against unjust enrichment.

The unjustness, inequity or unconscionable result at issue in *quantum meruit* are plainly not legal issues traditionally tried by or to a jury. *Quantum meruit* does not depend upon

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[3] A roughly analogous action at law under "quasi contract" was not even available in England until 1942 in *Fibrosa v. Fairbarn*, All.E.R. 122 (July 9, 1942). *See* Ralph A. Newman, *Equity and Law, a Comparative Study* (Oceana Publ., 1961), p. 219, footnote 4.

a finding of legal wrongdoing, such as conversion, by the enriched person. Innocent persons, such as bank depositors, can be liable in *quantum meruit* if their retention of the benefits would be inequitable or unjust under the circumstances. *Sunwest Bank of Alb. v. Colucci*, 177 N.M. 373, 872 P.2d 346, 348 (1994) (innocent recipient of bank deposit was not entitled to keep money mistakenly deposited in his account). An award of restitution is available where a party confers benefits upon another person under a void or invalid contract, or where there is no legal contractual privity at all. *Reynolds v. Slaughter*, 541 F.2d 254, 256 (10th Cir. 1976) ("where a plaintiff has paid money in the mistaken belief that an enforceable contract exists, the plaintiff is entitled to recover the money paid, as restitution"); *Ontiveros Insulation*, *supra*. Additionally, Ag Services' remedy here – restitution – is traditionally equitable, and there is no right to a jury trial as to a restitutionary remedy. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (ordering the return of property that rightfully belongs to another "is within the recognized power and the highest tradition of a court of equity"); *Local No. 391 v. Terry*, 494 U.S. 558 (1990) (stating that damages may be equitable where they are restitutionary, such as disgorgement of improper profits). Consequently, the Court of Appeals' holdings (1) that some kind of legal wrongdoing is necessary for relief in *quantum meruit* and equity and (2) that the jury could conclusively determine the requisite kind of inequity, unfairness or unconscionable result necessary for equitable relief are plainly erroneous, unsupported in law and must be reversed. This Court should find that the trial court was free to make its own independent determination on the equitable issues.

The evidence adduced at trial also does not support the Court of Appeals' determination that the jury "actually and necessarily" determined the issue of "wrongdoing" for

equitable purposes. (*Opinion*, App. at 14a, 16, 17a, *Order on Rehearing*, p. 53a.) The Court of Appeals merely speculates that the jury may have determined this issue, as the jury was not instructed regarding the kind of wrongdoing at issue in *quantum meruit* or equity generally, nor was this equitable kind of "wrongdoing" an explicit or implicit element of any of the legal claims presented to the jury. The jury verdict simply did not prove Nielsen was free from all wrongdoing. It merely proved his non-liability on the conversion, fraud and negligent misrepresentation claims. Indeed, Nielsen contended at trial that the Ag Services' conversion claim failed for numerous technical, legal reasons. Nielsen contended that Ag Services' security agreement was invalid as to the potatoes at issue, because Lundell did not have the requisite "rights in the collateral," as required under pertinent Uniform Commercial Code provision, NMSA 1978, § 55-9-203. Nielsen presented evidence that Lundell subleased some of the fields to DHFC and other fields to Nielsen *prior* to potato planting. Nielsen argued that Ag Services' UCC-1 financing statements failed to adequately describe the potato fields and were defective to perfect a security interest for growing crops under NMSA 1978, § 55-9-203(1). Nielsen asserted that either he or DHFC owned all of the potatoes at all material times, and hence, no conversion occurred. He concluded that even if Ag Services possessed a valid security interest in some of the potatoes, this claim was barred by the doctrine of waiver or statute of limitations.

It is impossible to know which of these alternative issues the jury actually determined. The jury may well have concluded that Ag Services' security agreement was invalid as to most of the fields at issue, and thus found only $162,000 conversion by DHFC. The jury may have believed Nielsen's testimony and argument that some of the fields were leased orally to DHFC and others to Nielsen, prior to planting. The

jury may have decided that Ag Services waived its conversion claim against Nielsen or that these claims were barred by limitations or other defenses. In sum, the jury likely reached its decision exonerating Nielsen of conversion on grounds *other* than exonerating Nielsen of equitable wrongdoing, so the trial court was not bound by this implied potential jury finding under the doctrine of issue preclusion. *Schiro v. Farley*, 510 U.S. at 223.

Quantum meruit should be freely available under these circumstances because it remained undisputed that Ag Services advanced valuable products and supplies pursuant to a failed or partially legally invalid security agreement and that its products and supplies were used by the corporation and Nielsen to grow the potatoes at issue. The trial court focused upon Nielsen's receipt of a benefit in light of the invalidity of the security agreement, which is the traditional analysis and proper grounds for equitable relief in *quantum meruit* and restitution. (*Finding* 36, App. at 38a.) Courts have held that *quantum meruit* or unjust enrichment is available under circumstances like these. *See Sunwest Bank of Alb. v. Colucci*, 827 P.2d at 349-50; In *Re Hoover*, 31 B.R. 432, 437 (Bkr. 1983); *Peterson v. Midland Nat. Bank*, 242 Kan. 266, 747 P.2d 159, 166 (1987). Indeed, NMSA §55-1-103 of the Uniform Commercial Code specifically preserves equitable remedies and principles. As one leading commentator has written:

> "With 1-103 and related law on the books, judges can escape the ancient dilemma of either adhering to the legal rule and doing an inequity, or of doing equity but in an unlaw-like fashion. Indeed, 1-103 imposes a duty on the judge to reach the equitable result unless the relevant general equitable principle has

been particularly displaced." White & Summers, *Handbook of The Law Under The Uniform Commercial Code*. (3d ed. 1988).

C. The jury did not "actually and necessarily" determine that Nielsen did not form DHFC for improper purposes.

The Court of Appeals also held that the jury implicitly determined that Nielsen did not use DHFC for improper purposes and its implicit finding precluded relief in *quantum meruit*, improper preference and piercing the corporate veil. (*Opinion*, App. at 14a, 16a-17a.) In doing so, the Court of Appeals again misapplied the issue preclusion tests set forth in *Schiro* and other Supreme Court precedent. The jury did not "necessarily decide" the issue of whether Nielsen formed DHFC for improper purposes. The jury was not instructed on the improper corporate purpose issue, nor was the issue an explicit or implicit factual element of the conversion, fraud or negligent misrepresentation claims. While the jury exonerated Nielsen of conversion, it likely did so for reasons *other* than finding Nielsen did not form DHFC for improper purposes. The jury probably followed the trial court's instructions and found Nielsen did not "directly or actively participate in the commission of the tort" of conversion and thus found that Nielsen was not liable, without addressing the improper corporate purpose issue.

The Court of Appeals specifically reasoned that the jury would have found Nielsen liable for conversion if it had found he formed DHFC for an improper purpose.[4] (*Opinion*, App.

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[4] The trial court found Nielsen's conduct to be wrongful not only due to formation of the corporation for the wrongful purposes of impairing or

at 16a.) However, this inference is illogical and belied by the evidence presented at trial. DHFC was incorporated in February 1992. The acts constituting conversion occurred in July to October of 1992 *after* the potatoes were harvested and proceeds checks came in and were diverted. Nielsen argued at trial that two employees, Charles Higgins and Gale Billings, controlled the day-to-day potato operations virtually the entire time and Nielsen testified that he was not even present at the farm during most of the period the alleged conversion took place. These facts, if accepted by the jury, may have exonerated Nielsen of active participation in DHFC's conversion but not of his earlier formation of DHFC for improper purposes. In sum, the jury could have logically grounded its verdict exonerating Nielsen of conversion for reasons *other* than not forming DHFC for improper purposes and thus not necessarily decided that particular issue for Seventh Amendment issue preclusion purposes. *Schiro v. Farley*, 510 U.S. at 223; *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 935-936 (11th Cir. 1983).

Moreover, the jury's exoneration of Nielsen of liability for DHFC's conversion of potato proceeds during the late summer of 1992, if true, does not necessarily infer that Nielsen did not form DHFC for improper purposes earlier in February 1992. A person could form a corporation for improper reasons yet *not* participate in the corporation's subsequent conversion of property and *vice versa*. The two factual issues are not logically or practically related to each

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cutting off a security interest, but also for the improper purpose of avoiding debts and obligations, and because Nielsen misused the corporate form by a lack of adequate capitalization. (*Conclusions*, 2, 3, App. at 40a.) These last two grounds also were not submitted to or determined by the jury, and constitute additional grounds for equitable relief in *quantum meruit*.

other such that one constituted a necessary component of the decision reached by the jury. *Dennis v. Rhode Island Hosp. Trust Nat. Bank*, 744 F.2d 893, 899 (1st Cir. 1984).

Nor was the "improper corporate purpose" issue "actually determined" by the jury. The jury was *not* instructed on the improper corporate purpose issue (or on the nature or elements of *quantum meruit* or unjust enrichment generally), so it cannot be said that the issue was actually presented to, much less "actually" determined by, the jury. Instead, both parties submitted proposed findings of fact and conclusions of law to the trial court, before and after trial, on the improper corporate purpose issue, showing that they believed these issues were being tried to the trial court – not the jury. Nielsen acknowledged in his proposed findings that the *quantum meruit* and piercing the corporate veil claims "are equitable and to be tried to the Court" and submitted specific findings to the Court that "DHF Clovis, Inc. was not set up for a fraudulent or improper purpose," that defendants "were not unjustly enriched by the retention and use of potato proceeds," and that "justice does not require a grant of restitution in *quantum meruit* to Ag Services." (*Defendants' Proposed Findings*, App. at 43a-44a, 50a.) During closing statements, counsel for petitioner informed the jury that the trial court, not the jury, was to determine the equitable claims:

> Ladies and gentlemen, some of my remarks will be concerning some of the issues that the Court will decide. Those are partnership by estoppel, *quantum meruit*, and piercing the corporate veil.
> And, obviously, some of my remarks will address the conversion claims that are before

> you, the fraud and the negligent misrepresentation claims. . . .

In sum, the record is devoid of evidence that the jury "actually determined" the improper corporate purpose issue or any of the equitable issues in reaching its general verdict. Under these circumstances, the jury cannot be said to have actually decided these issues, and the Court of Appeals stretched logic and natural reason in determining otherwise. *See Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988) (trial court not bound by jury's finding where general verdict entered, because no findings were made and it was impossible to tell upon which of several theories jury imposed liability); *Chew v. Gates*, 27 F.3d at 1438-39 (issue preclusion will not be applied as to speculative grounds of jury's decision).

Finally, nothing in *Beacon Theatres*, *Dairy Queen* or *Lytle* supports the Court of Appeals' holding that the trial court violated Nielsen's Seventh Amendment rights in its determination of the separate equitable claims and relief. *Beacon Theatres*, 359 U.S. 500, prohibits a trial judge from depriving a party of its constitutional right to a jury trial by ruling on the equitable claims first with the result that the legal claims become barred by issue preclusion. However, Nielsen's legal claims or defenses were not barred here, and Nielsen received a jury trial on all the claims he was so entitled.

Similarly, *Dairy Queen*, 369 U.S. at 472-73, does not require the dismissal of the equitable claims here. In *Dairy Queen*, plaintiff sought equitable relief arising out of breach of a licensing contract. The defendant sought a jury trial. This Court held that the legal issues regarding the breach of the licensing contract should be determined prior to the

equitable claims. That procedure was followed in the instant case.

Lytle, 494 U.S. 545, is likewise distinguishable. *Lytle* involved identical Section 1981 racial discrimination and Title VII claims. Lytle had a right to a jury trial on the Section 1981 claims but not on the Title VII claims. The trial court erroneously dismissed the Section 1981 claims and then held a bench trial on the Title VII claims. This Court held that the trial court's findings in the bench trial were not entitled to collateral estoppel effect where the Section 1981 claims were erroneously dismissed and that plaintiff was entitled to a new jury trial on that claim. That situation is not presented here. Nielsen received a full jury trial on the legal claims, and there is no similar, complete identity of the elements of the claims presented here, as there was in *Lytle*.

D. The trial court's decision on the improper preference claim did not conflict with the jury verdict.

The trial court below found that Nielsen should disgorge the improper preferences he received as a corporate officer or director. The trial court found as follows:

> Nielsen's receipt of the $323,352.00 Frito-Lay, Borden and Clover Club potato proceeds, and the $89,000.00 worth of packing inventory constitute an unlawful preference to an officer or director to the damage and detriment of Ag Services, and he must disgorge those proceeds to Ag Services.

(*Finding* 25, App. at 36a, *see also Findings* 23, 24, 25, 29, 30, App. at 36a-37a.)

The Court of Appeals reversed the trial court's imposition of liability for improper preference based upon the general jury verdict. (*Opinion*, App. at 17a.) The Court of Appeals held that, given its perceived "limits of jury verdict," it could not conceive of anything inequitable about Nielsen's receipt of DHFC's Frito-Lay proceeds or packing inventory for purposes of a improper preference claim. (*Id.*) In doing so, the Court of Appeals again failed to properly apply the rules governing the Seventh Amendment based issue preclusion.

An improper preference claim against a corporate insider does not depend upon proof of fraud, bad faith or wrongdoing – but violation of the duty of directors. *Smith v. Cox*, 113 N.M. 682, 684, 831 P.2d 981, 983 (1992). An officer or director of an insolvent corporation owes fiduciary duties to creditors of the corporation, and may not divert funds to himself, or favor payment of debts owed himself to payment of debts owed third-party creditors. *Id.*; *Pepper v. Litton*, 308 U.S. 295, 307-12 (1939); *United States v. Neidorf*, 522 F.2d 916, 918 (9th Cir. 1975) (a creditor may sue in equity to recover distributions to corporate officers or shareholders of insolvent corporation without regard to any wrongdoing on their part). Preferential transfer to a corporate insider may be set aside in equity, and the creditor may follow the "assets into the hands of one who is not a good faith holder." *Smith v. Cox*, 831 P.2d at 985.

The jury below was *not* instructed concerning any of the elements of an unlawful preference, including violation of the duty of the directors. Rather, these issues were plainly submitted to the trial court by the parties.[5] The jury verdict absolving Nielsen of conversion, fraud or negligent

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[5] See Point II below.

misrepresentation did not necessarily and actually address, much less resolve, any of the issues at stake in the preferential payment claim, and thus was not inconsistent with the trial court's decision.

The Court of Appeals also held that Ag Services' improper preference claim failed because Ag Services was not a creditor of the corporation. (*Opinion*, App. at 17a.) However, the trial court made several findings that Ag Services' "advances and loan" were assumed as business obligations of DHFC and thus Ag Services was a creditor of that business. (*See Findings* 9, 10, 16, 33, 34, 36, 38 App. at 31a, 38a.) These findings were not found to be clearly erroneous upon appeal,[6] and none of the foregoing issues were decided and rejected by the jury, because they were not actually made or necessarily determined in its verdict on the conversion, fraud or misrepresentation claims. Finally, Ag Services has a valid $162,000 judgment against DHFC, which judgment was not disturbed upon appeal. (*See Opinion*, App. at 25a ("The judgment against DHFC is undisturbed, it having abandoned its appeal")). Ag Services is also judgment creditor of the corporation.

E. The trial court's decision on piercing the corporate veil did not conflict with the jury verdict.

Piercing the corporate veil is a traditional, equitable doctrine designed to prevent a corporate entity from being

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[6] Both principals of the corporation, Nielsen and Lundell, admitted at trial that Ag Services was a creditor or carried as an account payable on the company's books and records, and the company made payments by corporate checks to Ag Services amounting to $50,000 on the account, thus plainly acknowledging Ag Services to be a corporate account payable. (App. at 31a.)

used for improper purposes or where recognizing the corporate entity would produce injustice or inequitable consequences. *Garcia v. Coffman*, 124 N.M. 12, 946 P.2d 216 (Ct. App.), *cert. denied*, 123 N.M. 626, 944 P.2d 274 (1997). The trial court found that Nielsen should be held personally liable to Ag Services under piercing the corporate veil on grounds, *inter alia*, as follows:

> 2. The corporate entity of Diamond Hill Farms, Clovis, Inc. shall be and is disregarded because the corporation was formed and is being used for improper or wrongful purposes, as set forth in *Garcia v. Coffman*, 124 N.M. 12, 946 P.2d 216 (1997). The corporate entity did not exist at the time Lundell and Nielsen agreed to the 1992 potato venture or when Ag Services extended substantial credit to their business and was formed thereafter for the wrongful purpose of avoiding such debt or obligation, and perpetuating injustice upon Ag Services.

(App. at 40a., *see also Findings* 13-23, App. at 32a-34a.)

The Court of Appeals reversed the trial court's conclusion on piercing the corporate veil because it was unable to reconcile the jury verdict with Nielsen's "use of the corporate form to perpetrate a fraud" on Ag Services. (*Opinion*, App. at 24a.) It found the trial court's "finding of improper purpose is irreconcilable with the jury verdict." (*Id.*)

The jury did not actually and necessarily decide the issue of whether Nielsen used DHFC to perpetrate a fraud or for any other improper purpose in reaching its general verdict. The jury below was not instructed regarding the kind of

improper purpose required for piercing the corporation veil; rather, each of these issues was submitted to be tried to the court by agreement of the parties, as explained in Point II below. The verdict did not exonerate Nielsen of wrongdoing in the sense of his fraudulent use of DHFC, because the kind of fraud at issue in piercing the corporate veil is different than common law fraud or misrepresentation. The New Mexico Supreme Court has rejected the notion that proof of improper purposes is limited to proof of fraud or misrepresentation, stating that "misrepresentation of assets and purposes is but only one 'species' of improper purposes." *Garcia,* 124 N.M. at 17, 946 P.2d at 220-222. The Court of Appeals erred in determining that the general verdict based upon conversion, fraud and negligent misrepresentation exonerated Nielsen from any and all liability on the piercing the corporate veil theory.

Moreover, different standards of proof were involved in the jury trial of the fraud claims and the bench trial of the equitable claims. This Court has held Seventh Amendment issue preclusion does not apply where the prior action has a higher, stricter standard of proof, such as fraud. *See United States v. Watts*, 519 U.S. 148, 155-56 (1997). Fraud is governed by the clear and convincing standard of proof, while *quantum meruit*, partnership by estoppel and piercing the corporate veil claims are each governed by the preponderance of the evidence standard. The general fraud verdict is not binding for any common issues of fact as to the equitable claims. *Id.*

The Court of Appeals also held that Nielsen cannot be liable under piercing the corporate veil unless the corporation was found liable for the same damages, because the theory is a form of derivative, vicarious liability, and DHFC was not liable to repay Ag Services' note or advances. (*Opinion*,

App. at 23a-24a.) First, Nielsen's attempt to use the derivative liability theory as a shield is misplaced. The New Mexico Court of Appeals considered and rejected a similar argument in *Garcia v. Coffman*, 124 N.M. at 20, 946 P.2d at 224, where the corporate officer was held directly liable for $50,000 in punitive damages, even though *no* such damages were awarded against the corporation. The New Mexico Court of Appeals held that an *individual's* liability is determined by piercing the corporate veil and upheld the direct damage award against the officer. Indeed, to determine otherwise would favor the *improper* use of the corporate veil to the detriment of its creditors and permit a newly formed corporation to evade existing obligations which would be contrary to the very purposes of piercing the corporate veil. *Seaside Indust., Inc. v. Cooper*, 766 S.W.2d 566, 569 (Tex. App. 1989) (courts must look through the form of complex transactions to the substance to determine abuse of corporate privilege). Second, the Court of Appeals overlooked that the trial court specifically found that Ag Services' advances were assumed as "accounts payable" and corporate obligations of DHFC, and these findings were not clearly erroneous, as stated above. Third, Ag Services is unquestionably a $162,000 judgment creditor of DHFC. (App. at 26a-27a.)

F. Seventh Amendment issue preclusion should not broadly apply because Ag Services won below and it would be manifestly unfair to give preclusive effect to an unappealable verdict.

There are additional sound reasons for not broadly applying Seventh Amendment based issue preclusion, as the Court of Appeals did here. Issue preclusion applies only where there has been a "full and fair opportunity" to litigate the issue in the prior proceeding. *Haring v. Prosise*, 462 U.S. at 318-19. Under longstanding law, only a party

aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939). A winning party is generally not aggrieved by the judgment affording the relief and cannot appeal from it. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980). Therefore, issue preclusion ordinarily does not apply to determinations adverse to the winning party, and a winning party is *not* barred from relitigating adversely decided collateral issues. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2nd Cir. 1986); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2nd Cir. 1995).

The Court of Appeals held below that the jury verdict is binding upon Ag Services for Seventh Amendment issue preclusion purposes because Ag Services did *not* file post-trial motions or appeal the verdict. (*Opinion*, App. at 11a.) The Court overlooked that Ag Services prevailed below by virtue of its $750,000+ judgment rendered in its favor against Nielsen, which exceeded the amount in its prayer for relief, and hence, Ag Services had little legal ability and no incentive to appeal. It would be unfair to bind Ag Services to all potential implied inferences from a jury verdict when a favorable judgment was nevertheless entered and where the jury verdict itself has not and could not have been subject to effective appellate review. *See Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168-70 (5th Cir. 1981). The Court of Appeals is, in effect, requiring Ag Services either to have sought to set aside a *favorable* judgment or to have appealed its *favorable* judgment to protect against potential adverse collateral consequences flowing from implicit findings in the general jury verdict. Forcing all winning litigants to seek new trials or take such appeals is unrealistic, unfair and contrary to law, would be a waste of resources for both the

litigants and the courts and is plainly contrary to the principles of judicial economy that underlie issue preclusion.

This case is important. The Court of Appeals' decision, if left uncorrected, improperly extends the Seventh Amendment right to a jury trial over "implied" equitable issues and causes. It does so under circumstances where it is impossible to verify which issues the jury determined and whether the jury *properly* considered and determined any of the equitable issues. This result is neither required nor contemplated by the Seventh Amendment and certainly impedes and frustrates the ability of the trial court to do justice and equity in cases before it, which will erode public confidence in the judicial system.

G. Alternatively, the trial court correctly imposed personal liability upon Nielsen for at least $162,000 of restitution.

The Court of Appeals also absolved Nielsen of personal liability for the $162,000 jury verdict entered against DHFC on the grounds the trial court allegedly did not make any findings purporting to make Nielsen liable for the $162,000 verdict. (*Opinion*, p. 24, App. at 24a.) However, the trial court actually found as follows:

> In the event this matter is appealed, and upon appeal, the appellate court finds that this Court, in determining equitable claims and relief, is bound by the jury's $162,000.00 damage award against Diamond Hill Farms, Clovis, Inc. for conversion, then the Court finds as follows: Defendant Nielsen should be held personally liable to Ag Services under piercing the corporate veil, partnership by

> estoppel and in *quantum meruit* payment of the $162,000.00 verdict against Diamond Hill Farms, Clovis, Inc., plus interest thereon at the rate of 15% per annum, compounded annually, from January 1, 1993 until paid.

(*Conclusion* 8; App. at 41a.)

At trial, Nielsen had argued that the trial court was limited to the jury's $162,000 damage award. Ag Services pointed out that completely different measures of damages were involved in conversion and the equitable claims. A legal measure of damages is neither the limit nor the measure of equity, particularly in restitution. The trial court agreed with Ag Services but specifically entered the foregoing alternative Conclusion No. 8 to address Nielsen's concern. The Court of Appeals committed error in concluding no such findings were entered, when in fact, they were.

II. NIELSEN WAIVED HIS RIGHT TO A JURY TRIAL AS TO COMMON FACTUAL ISSUES PRESENTED IN EQUITABLE CLAIMS.

The Court of Appeals also failed to address Nielsen's waiver of his Seventh Amendment right to a jury trial as to any of the factual issues presented in the equitable claims or the impact this waiver has on the issues presented upon appeal. Nielsen plainly acknowledged to the parties and the trial court below that the *quantum meruit* and piercing the corporate veil claims were equitable claims to be tried to the bench, submitted proposed findings and conclusions to the trial court on these claims, and failed to request a special jury verdict as to any common issues. (*See* App. at 43a-51a.)

It is elementary that a right to a jury trial may be waived. *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 845 (10th Cir. 1993). Nielsen agreed and acknowledged that *quantum meruit* and piercing the corporate veil causes of action "are equitable and to be tried to the court" and submitted numerous proposed findings of fact on these equitable issues to the court, both before trial and after the jury verdict. (App. at 43a-44a.) The jury was informed during closing statements that the *quantum meruit*, partnership by estoppel and piercing the corporate veil claims were to be decided by the court – not the jury – without objection or correction. The equitable issues were subsequently tried to the court.

Moreover, Fed. R. Civ. P. 49 provides litigants a method to have a jury make specific factual determinations, if he desires. A party waives his right to jury trial on any issue of fact not specifically submitted to the jury in a special interrogatory. *United States. v. Kim*, 111 F.3d 1351 (7th Cir. 1997); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 896-97 (10th Cir. 1956). Nielsen failed to submit special interrogatories regarding any particular issue pursuant to Fed. R. Civ. P. 49(a), which is consistent with the parties' determination to have the equitable claims and issues determined by the bench and waived whatever right he may have had to such a jury determination of any specific common factual issues by failing to do so. While Ag Services clearly raised the foregoing issues in its *Answer Brief*, the Court of Appeals failed to address them. The Court of Appeals' failure to address the jury trial waiver issue is important, because it is dispositive of the *quantum meruit* and piercing the corporate veil claims. This Court should reverse the Court of Appeals, decision because Nielsen had no possible Seventh Amendment rights at stake with respect to the equitable claims.

III. PARTNERSHIP BY ESTOPPEL DOES NOT REQUIRE EXTENSION OF CREDIT TO A SEPARATE PARTNERSHIP ENTITY.

The Court of Appeals reversed the trial court's determination of partnership by estoppel liability because Ag Services did not extend credit to a partnership entity. (*Opinion*, App. at 19a-23a.) The Court of Appeals erred in construing liability for partnership by estoppel. The definition of "partnership" is merely "an association of two or more persons to carry on as a business for profit." NMSA 1978, § 54-1-6A. Partnership by estoppel liability is defined in NMSA 1978 § 54-1-16A as follows:

> A. When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him or anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership. . .
>
> . .
>
> (2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

Consequently, a partnership by estoppel may be established by extending credit to the actual or apparent partnership or to an "association of two or more persons who carry on as a business for profit." Individual "partnership by estoppel" liability may be established pursuant to § 54-1-16A(2) even

where there is no partnership liability. Credit need not be advanced to the partnership entity, itself, and Court of Appeals' interpretation ignores § 54-1-16A(2). The cases also hold that a contract or loan need not be made in the formal name of a partnership in order to establish partnership by estoppel liability.[7] *Cheesecake Factory Inc. v. Baines*, 125 N.M. 622, 964 P.2d 183 (Ct. App. N.M. 1998) (partnership by estoppel liability established where partnership was not named on loan or account based upon mere representations to the seller that Baines was a partner and the seller's reliance thereon); *Barnes v. McLendon*, 128 Wash.2d 563, 910 P.2d 469 (1996).

The trial court committed no abuse of discretion below in finding partnership by estoppel liability here. The evidence adduced at trial showed that Ag Services relied upon Nielsen's and Lundell's representations that they were in the potato business together, knew Nielsen expected to share in the profits of the business and relied upon his expertise, advance potato contracts and integrity in making the loan at issue. (App. at 37a-38a, 40a.) Indeed, Ag Services would not have extended credit *without* the Frito-Lay contract or Nielsen's involvement in the business.

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[7] It has long been established that a partner may bind the partnership to contracts which are apparently for the purpose of carrying on the business. *See* NMSA 1978, § 54-1-9A; *Dotsun v. Grice*, 98 N.M. 207, 647 P.2d 409 (S.Ct. 1982).

CONCLUSION

For all of the foregoing reasons, the *Petition for a Writ of Certiorari* should be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed November 6, 2000]

No. 99-2081

AG SERVICES OF AMERICA, INC., an Iowa corporation,
Plaintiff-Appellee,

v.

JOHN D. NIELSEN, also known as JACK NIELSEN and DIAMOND HILL FARMS, CLOVIS, INC., a New Mexico corporation,
Defendants-Third-Party Plaintiffs-Third-Party Counter-Defendants-Appellants,

v.

TERRY LUNDELL,
Third-Party Defendant-Third-Party Counter-Claimaint.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CIV-96-1637-JC/WWD)

Before **MURPHY** and **HOLLOWAY**, Circuit Judges, and **COOK**, District Judge.*

HOLLOWAY, Circuit Judge.

This is a diversity case arising from an agricultural loan. Plaintiff/appellee Ag Services of America, Inc. (Ag Services), the lender, commenced the action in the district court against Defendant/appellant John Nielsen and Diamond Hill Farms, Clovis, Inc. (DHFC). Ag Services asserted under a number of different theories - including conversion, fraud, negligent misrepresentation, unjust enrichment, piercing the corporate veil, and partnership by estoppel - that Nielsen should be held liable for an unpaid agricultural loan it had extended to Terry Lundell. Ag Services sought recovery of some $691,000 in monetary damages, interest, costs, attorney's fees, and punitive damages in its complaint. I App. 38. As for DHFC, Ag Services alleged that it had converted crop proceeds in which Ag Services held a security interest, an interest which had been granted by Lundell as part of the loan agreement.

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* The Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

I

A

At the bottom of this controversy is the fact that Ag Services made a loan to Lundell of almost $800,000 which he failed to repay. Lundell had leased a large farm near Clovis, New Mexico, on which he planned to grow potatoes (on about one-quarter of the farm) and other crops. The terms of the loan agreement contemplated that the crops (for our purposes, especially the potatoes) and the proceeds from those crops would be the primary collateral for the loan. The evidence was that the income from the potatoes was slightly greater than the production costs. Ag Services, however, received only $50,000 of the approximately $2 million of crop proceeds.

Nielsen was associated with Lundell in the potato operation with Ag Services' approval, but he had nothing to do with other crops Lundell was growing on the Clovis farm. Shortly after the bulk of the advances had been made on the loan agreement, Nielsen and Lundell formed DHFC. With few exceptions the eventual potato proceeds went to DHFC and from its account into an account in the name of Lundell Farms, the name under which Lundell was conducting the farming of other crops on the Clovis farm.

Having received only fifty thousand dollars from potato proceeds, Ag Services eventually sued Lundell in state court in Iowa. That suit was settled with no cash payment from Lundell. Ag Services then brought the instant suit against Nielsen. One of Ag Services' primary contentions was

that Nielsen knowingly used DHFC to avoid Ag Services' security interest in the potatoes and potato proceeds.

Nielsen's defense was based largely on the contention that the potato proceeds in the Lundell Farms account were more than sufficient to repay the loan, but Lundell took almost half the proceeds and used them to repay himself for his contributions to the endeavor and for other personal uses. Nielsen received a much smaller portion of the proceeds, approximately fifteen per cent, which reimbursed only about half of his contributions to the enterprise, leaving him with a net loss which he calculated to be $389,075.00.[1] The rest of the proceeds had been paid to other creditors.

At the end of the 1992 season, Lundell acknowledged his receipt of funds in excess of his contributions and gave Nielsen a promissory note in the amount of $355,000.00. Nielsen later brought suit on this note in state court in Arizona and was granted judgment by default, but Nielsen received no payments on this judgment.[2]

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[1] Nielsen's evidence as to the final accounting for the 1992 Clovis potato operation was not contested at trial.

[2] Nielsen brought a third-party complaint against Lundell in the instant case, and Lundell filed a counterclaim against Nielsen. The district court's grant of summary judgment to Nielsen on Lundell's counterclaim on *res judicata* grounds is the subject of a related appeal, No. 99-2094, in which our opinion is being filed today.

B

Below, the instant case proceeded to trial in which Ag Services' legal claims (conversion, fraud and negligent misrepresentation) were tried to a jury, with other, equitable claims (piercing the corporate veil, partnership by estoppel and *quantum meruit*) being tried simultaneously to the judge by consent of the parties.[3] The jury was thus instructed to decide whether Nielsen was liable to Ag Services under the three legal theories first mentioned - conversion, fraud, and negligent misrepresentation. The jury was instructed that as to conversion, it should determine whether Nielsen and DHFC were liable. The jury found in favor of defendant Nielsen on all three legal theories advanced against him - conversion, fraud and negligent misrepresentation. The jury found DHFC liable to Ag Services for conversion and assessed $162,000 in damages against DHFC. DHFC has not appealed that judgment against it.[4] Nor has Ag Services appealed that award, although it is for less than it sought.

After the lengthy jury trial, the court heard additional argument on the equitable claims against Nielsen and took the matter under advisement. The district judge, during argument

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[3] The district judge in effect granted judgment as a matter of law on several of Ag Services' legal theories by declining to instruct the jury on those theories. Ag Services has not appealed those rulings.

[4] While DHFC joined in the notice of appeal with Nielsen, it did not join in the brief, and we deem it to have abandoned its appeal.

to him about the equitable claims, said the jury's findings in favor of Nielsen on the legal claims of conversion, fraud and negligent misrepresentation "were erroneous."[5] The judge later issued his own findings of fact and conclusions of law, holding that Nielsen was liable to Ag Services for damages of $412,352, plus prejudgment interest at the rate of ten per cent per annum. As we read the court's findings and conclusions,

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[5] During the argument to the court, counsel for Mr. Nielsen said that the court was bound not just by the facts stated in the jury verdict, but also by any facts the jury must have necessarily found. 5 App. at 1548. Nielsen's counsel further said the jury was instructed that if they found that DHFC had converted potatoes or proceeds, and if they found "that defendant Nielsen directed, controlled or ratified the activity that lead to the conversion, then he is personally liable for damages." *Id.* Counsel pointed out the jury found no personal liability for damages as to Nielsen, and if they followed the instruction, Instruction No. 8-S, I App. 341, which we must assume they did, that meant that the jurors found that he did not direct, control, approve or ratify the activity that constituted a conversion. *Id.* The trial judge interjected:

> In my opinion, there's no way the jury should have found that. I mean, that's clearly, to me, an erroneous jury verdict, so I'm sitting here in equity taking care of it on the other basis, and this is one of the times, one of the few times, when I disagree with the jury. I think they just reached a compromise verdict to get out of here. I mean, after several days of listening to you all, I think they were tired and probably a little bored and just wanted to get away.

Id. Thus the judge disregarded the jury's findings, which we agree had been to the effect that Nielsen did not direct, control, approve or ratify the conversion activity.

the judge held that Nielsen was liable for this sum under the equitable theories of partnership by estoppel, piercing the corporate veil, and *quantum meruit* or unjust enrichment.[6]

II

A

Nielsen's appeal challenges the court's judgment entered against him which the judge's findings and conclusions said was for $412,352 and prejudgment interest, as noted above. Nielsen says that the judgment against him in

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[6] The parties dispute whether the district court also held that Nielsen was liable as a corporate insider for the receipt of a preferential payment and, if so, whether Nielsen had proper notice that such a theory was asserted. The theory does not appear in the pretrial order and, as we read the district judge's findings and conclusions, he did not rule on this basis.

While there is a finding that all of the assets received by Nielsen were wrongful preferences, that appears to have been made in support of the court's conclusion that the corporate veil should be pierced. There are no other conclusions of law addressing wrongful preference. The court also made a finding as to the statute of limitations defense which specifically mentions three equitable theories of relief, the ones discussed herein, but not wrongful preference. Similarly, the judge made an alternative ruling which also mentioned the three equitable theories of relief, but not wrongful preference. Accordingly, we need not address this issue further.

effect is for approximately $750,000 when interest is computed, and that the judgment is in error.

First, Nielsen's central argument is that his rights under the Seventh Amendment to the United States Constitution were violated by the judge's findings and conclusions on the equitable claims. He argues that the judge was bound by all jury findings expressly made and those implicit in the jury's verdict on the legal claims. Nielsen says that the jury had earlier completely exonerated him on the legal claims of fraud, negligent misrepresentation and conversion, and that the jury had found that Ag Services' total damages were only $162,000 with interest included. In addition, Nielsen argues there were other errors in the judge's findings that he was liable on the equitable claims presented.

B

We first turn to Nielsen's Seventh Amendment argument which we find dispositive. Nielsen argues that in deciding the equitable claims, the district judge erred by rejecting the jury's verdict and making findings of fact which conflict with that verdict.

Nielsen's argument focuses on controlling principles that support his Seventh Amendment argument. Those principles flow logically from the seminal decisions of the Supreme Court protecting Seventh Amendment rights to trial by jury - *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959). In applying those teachings we have held:

> The Seventh Amendment protects a party's right to a jury trial by ensuring that factual determinations made by a jury are not thereafter set aside by the court, except as permitted under common law. . . . . *Thus, under the Seventh Amendment, the court may not substitute its judgment of the facts for that of the jury; it may only grant a new trial if it concludes that the jury's verdict was so against the weight of the evidence as to be unsupportable.*
>
> *The strictures of the Seventh Amendment are particularly applicable in a case where, due to the presence of both equitable and legal issues, trial is both to the jury and to the court. In such a situation, when a case involves both a jury trial and a bench trial, any essential factual issues which are central to both must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues. Moreover, the court is bound by the jury's determination of factual issues common to both the legal and equitable claims.*

Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1442-43 (10th Cir. 1988) (emphasis added; internal citations omitted). *See also Butler v. Pollard*, 800 F.2d 223, 224-26 (10th Cir. 1986).

In *Butler v. Pollard*, the plaintiffs' legal claim had been tried to a jury, which had rendered a verdict in favor of

some of the defendants. The trial judge then decided that he was not bound by the jury verdict and issued an injunction against all of the defendants. This court reversed, holding that the general verdict in favor of the individual defendants undercut any basis for the injunction. The legal claim was one of trespass. By deciding that claim in favor of the individual defendants, our court held, the jury "of necessity" must have determined either that there had been no entry upon the plaintiffs' property or that any entry had been with permission. *Id.* at 225. Significantly for our purposes, the general verdict in that case did not demonstrate which of these factual issues were decided in favor of the individual defendants. This court examined the possible bases for the verdict, however, and determined that either alternative would vitiate any ground for the injunctive relief sought.

Thus, in accord with *Butler v. Pollard*, we must consider what findings are explicit or necessarily implied by the verdict, including examining alternative bases by which the jury could have reached its conclusion. We said in *Butler* that the matter was one of issue preclusion (formerly termed collateral estoppel), and the general rule in applying issue preclusion appears to be in accord with our reading of *Butler*. *See* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4420, at pp. 186-87 (1981).

In defending the trial judge's actions here in rejecting the jury's earlier findings and substituting his own to decide the equitable claims, Ag Services contends that the jury verdict was, as the trial judge said, erroneous and a compromise verdict, reached simply so the tired jurors could go home. The judge did indeed make remarks to this effect at

the subsequent hearing on the equitable claims.[7] If the trial judge believed that the verdict was so against the evidence as to be unsupportable, he could have set it aside. *See* Fed. R. Civ. P. 59(a) (court may order new trial *sua sponte*). But here the trial judge did *not* set aside the verdict and order a new trial, notwithstanding his comments disparaging the verdict. The trial judge here instead made his own findings on the equitable claims. He left intact the jury's verdict and its explicit findings and those necessarily implicit from the verdict. We also note that Ag Services did not file any post-trial motion to challenge the verdict, nor is any challenge to the verdict made on appeal. Consequently, we conclude that we must treat the verdict as binding under collateral estoppel or issue preclusion principles. *See Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1272 (10th Cir. 1995).

The district judge, as we have noted, disregarded the jury verdict although he did not set it aside. We conclude that this was error, depriving Nielsen of his right to a jury determination of all issues common to the legal and equitable claims. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552-53 (1990) (reversing judgment based on trial judge's findings on equitable claims; where properly joined legal claims had been dismissed in error, entire judgment must be vacated and the case retried with legal claims decided by a jury so that litigant's right to jury trial is preserved). We must therefore turn to an analysis of what findings were actually made by the jury or were necessarily implicit in its verdict, *see Butler v. Pollard*, 800 F.2d at 225, and whether the subsequent findings by the trial judge in deciding the equitable

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[7] See note 5, *supra*, quoting the referenced remarks.

claims may have been in conflict with the jury's determinations. If there is no conflict, the error would be harmless.

III

As we have already pointed out, the analysis in *Butler v. Pollard* did not purport to determine the precise basis of the jury verdict, and we glean from that case the teaching that such precise inferences are not always necessary for application of issue preclusion. Instead, we examine the possible inferences from the verdict against the findings and conclusions made by the district judge on the equitable claims.

Ag Services contends that the general verdict did not necessarily decide any specific issue of fact and so properly was given no preclusive effect by the judge in deciding the equitable claims.[8] *See* Brief of Appellee Ag Services of America, Inc., at 11. This argument has two branches, the first of which is the proposition that the jury verdict was not binding on the district judge because the elements of the legal claims decided by the jury are not the same as those of the equitable claims decided by the court. We must reject this argument, which is based on a misinterpretation of *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988).

On the particular facts in *Skinner*, we did say that in a "case under Title VII and § 1981 arising out of the same

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[8] We note that this is in essence a harmless error argument.

facts, the commonality of factual issues between the § 1981 and Title VII claims is nearly all-encompassing. The elements of each cause of action have been construed as identical." 859 F.2d at 1444. Therefore the verdict on § 1981 liability would normally be conclusive in a parallel Title VII claim. *Id.* However, the issue as we framed it in *Butler v. Pollard,* 800 F.2d at 224, is one of issue preclusion or collateral estoppel. Common elements of each cause of action, as were presented in *Skinner*, are not required for the doctrine to apply. Under issue preclusion principles, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue *in a suit on a different cause of action* involving a party to the first case." *Robinson v. Volkswagenwerk AG,* 56 F.3d 1268, 1272 (10th Cir. 1995) (citing *Allen v. McMurry,* 449 U.S. 90, 94 (1980)).

The true test is whether the jury verdict by necessary implication reflects the resolution of a common factual issue. If so, the district court may not ignore that determination, and it is immaterial whether, as here, the district court is considering equitable claims with elements different from those of the legal claims which the jury had decided (as may often be the case). *See Butler v. Pollard,* 800 F.2d at 225-26.

Further developing its argument that no specific fact findings can be inferred from the jury verdict, Ag Services argues that the jury could have reached its disposition by accepting any of several defenses offered at trial by Nielsen. To evaluate this contention, we first proceed to examine the verdict in light of all the evidence presented.

We focus our analysis of the jury verdict on the distinction drawn by the jury on the conversion claims,

finding DHFC - but not Nielsen - liable for conversion. The jurors were instructed to find Nielsen liable for conversion by DHFC if he "directed, controlled, approved or ratified the activity that led to the conversion." I Aplt. App. 341. Because the jury found Nielsen not liable for DHFC's conversion, the inference is unavoidable that the jurors concluded that Mr. Lundell, not Mr. Nielsen, was responsible for the conversion committed by DHFC. DHFC was owned fifty per cent by Nielsen and fifty per cent by Lundell, and Lundell ultimately controlled the Lundell Farms bank account into which almost all potato proceeds were transferred.

We turn to Ag Services' contention that the general verdict does not necessarily imply any particular fact findings because of the assertion of multiple defenses at trial. Ag Services' argument fails because it has not demonstrated that any of the possible jury rationales it identifies would imply wrongdoing by Nielsen on which liability might have been properly based in equity. In short, any explanation for the jury's decision that Nielsen did not convert the Frito-Lay proceeds leads inexorably to the conclusion that the jury found no wrongdoing by Nielsen.

Thus although we have not found any specific factual findings which are necessarily implied by the jury verdict, we do find necessary inferences from the verdict indicating that certain views of the evidence were *not* taken by the jury as they could not have rationally supported the result. The most significant of these is that Nielsen did not participate in or ratify the conversion by DHFC. There remains the task of determining whether the trial judge's findings on the equitable claims may be reconciled with the verdict; we also must address other legal challenges to the district court's judgment.

IV

The district court held that Nielsen was liable to Ag Services under the doctrine of *quantum meruit* for some $323,353.72 (proceeds from the business) and $89,000 (packing inventory). II Aplt. App. at 20. The New Mexico Supreme Court has recognized that the terms unjust enrichment, quasi contract and contract-implied-in-law are interchangeably used "to describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between two parties regardless of their [lack of] assent thereto." *Hydro Conduit Corp. v. Kemble,* 793 P.2d 855, 861 (N.M. 1990) (quoting *Paschall's, Inc. v. Dozier,* 407 S.W.2d 150, 154 (Tenn. 1966)). The New Mexico high court has further said that "in such cases the simple but comprehensive question is whether the circumstances are such that equitably [the defendant] should restore to [the plaintiff] what [he] has received." *Allsup v. Space,* 367 P.2d 531, 537 (N.M. 1961) (citing *Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301, 310 (1935)).

The judge found that Nielsen formed DHFC for the express purpose of impairing Ag Services' security interest in the potatoes. II Aplt. App. 414-15. There is impeachment evidence in the record tending to support this finding. III Aplt. App. 997-99. Nielsen was called as an adverse witness in Ag Services' presentation of its case. On direct examination by counsel for Ag Services, this exchange occurred:

> Q: [S]o you entered into the subleases and formed this business, so you didn't have to

> worry about Ag Services' security interest in Lundell's potatoes; isn't that right?
>
> A: No, you're saying the only reason I organized the business was to not worry about Ag Services' security interest, and, no, that's totally not right.

Id. at 998. Counsel for Ag Services then attempted to impeach Nielsen with this testimony he had earlier given in a deposition:

> Q: So you're saying in 1992 you thought this through, and you didn't worry about Ag Services' security interest because Lundell didn't own any of the potatoes?
>
> A: Well, yes, because that's the way - the reason we structured the business that way.

Id. at 999.

Thus, although there is some evidence to support the judge's finding, there is also evidence to the contrary. We think it plain that the jury did not find Nielsen formed the corporation in order to impair Ag Services' security interest because, if it had, it would have found that Nielsen had converted the Frito-Lay proceeds. Instead it found no conversion by Nielsen. Therefore, we must conclude that the district court should have applied issue preclusion because of the finding by the jury of no conversion by Nielsen. The court should have followed that jury finding and should have found that Nielsen did not form the corporation to impair Ag Services' security interest. The court erred by resolving this

issue of fact contrary to the jury verdict from which issue preclusion applied.

The trial judge also found that Nielsen's receipt of the Frito-Lay proceeds ($323,352) and the packing inventory ($89,000) amounted to wrongful preferences, II Aplt. App. 418, ¶ 26, that is improper payments to a corporate insider in derogation of the rights of third-party creditors. Because unjust enrichment is a remedy adaptable to many situations this conclusion could conceivably support the imposition of liability on the unjust enrichment theory.

The theory of wrongful preference serves to protect creditors of the corporation, however, and Ag Services was a creditor of Lundell, not DHFC. Thus, although Nielsen received the packing materials after knowledge that the corporation was insolvent, we still do not see how that converts Ag Services into a creditor of DHFC (instead of being a creditor of Lundell) which could invoke the wrongful preference doctrine. In short, within the limits we perceive were created by the jury verdict, we cannot find that there was anything inequitable in Nielsen's receipt of the Frito-Lay proceeds or the packing materials. Liability for unjust enrichment cannot be premised on the unsupported conclusion that Nielsen received a wrongful preference from DHFC.

Although liability may be imposed under the theory of unjust enrichment for conduct which does not constitute a tort or a breach of contract, *see Hydro Conduit Corp.*, 793 P.2d at 860, in the circumstances of this case, we believe any conduct by Nielsen on which liability for the Frito-Lay proceeds could be based would have amounted to conversion or negligent misrepresentation. The jury verdict, however,

precluded the trial judge from finding that either of these occurred. In stating that he found the jury's verdict "erroneous" in finding no conversion by Nielsen, *see* note 5, *supra*, the trial judge in effect acknowledged that his findings were inconsistent with the verdict. As we have explained, however the judge was bound by the verdict because he did *not* set it aside and order a new trial.

We have examined the trial judge's findings in a search for findings not precluded by the verdict which would support the judge's conclusion that liability should be imposed for unjust enrichment. Having discovered none, we must reverse the judgment insofar as it is based on this theory.

V

We also are persuaded by Nielsen's arguments that the judgment of the district court cannot be sustained on the theory of partnership by estoppel. Under the applicable statute in effect at the time, Ag Services could establish a partnership by estoppel either by showing that a representation of partnership was made directly to Ag Services and that it relied thereon in extending credit, or by showing that representations had been made so publicly that knowledge of the representations is implied by law without the necessity of any further proof. *See Cheesecake Factory, Inc. v. Baines*, 964 P.2d 183, 187 (N.M. Ct. App. 1998) (applying now repealed version of § 54-1-16).[9] For ease of discussion, we

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[9] Effective July 1, 1997, New Mexico repealed its Uniform Partnership Act and adopted a revised version. Because the events at issue here occurred in 1991 and 1992, we deal with the former

will refer to the two options respectively as the private representation and the public representation alternatives.

Several of the findings and conclusions by the district judge were clearly intended to support the conclusion that Nielsen should be liable as a partner by estoppel. Therefore, we have carefully examined each of the relevant findings and conclusions. The district court apparently intended to base Nielsen's liability on both the private representation and the public representation types of partnership by estoppel, and Ag Services appears to argue in its brief that liability was correctly imposed under either branch of the estoppel doctrine.

As to liability based on private representations, Ag Services points to findings by the district judge that Ag Services had relied on representations, made to it by both Nielsen and Lundell, that Nielsen was "in business" with Lundell, and that Nielsen had acknowledged that the advances by Ag Services were "business obligations." *See, e.g.*, Findings of Fact and Conclusions of Law, II Aplt. App. 413 at ¶ 9; 419 at ¶¶ 33 & 34. These findings do not support the conclusion that Nielsen should be liable for Lundell's loan as a partner by estoppel because there is no finding that either man told Ag Services that they would be partners, nor is there a finding that Ag Services relied in any way on the belief that they would be partners. Indeed, the evidence, without contradiction, was that Ag Services did *not* believe that Lundell and Nielsen were partners. Instead, loan officer

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version of the act. N.M. Stat. Ann. § 54-1-16(A) (Michie 1978) (repealed).

Knoploh testified, "Well, I don't think it was a partnership. It was - they were exchanging labor and equipment and this type of thing . . . ." II Aplt. App. 663. *See also id.* at 641-42; 676-77; 697 ("We were not looking at [Nielsen] to pay the loan.").

Ag Services did not require or expect Nielsen to participate as a partner, nor did it ask him to guarantee repayment of Lundell's loan, nor did it expect him to repay the loan. Ag Services was relying on Nielsen assisting Lundell, not on Nielsen's financial strength. This distinguishes the instant case from *Anderson Hay & Grain Co. v. Dunn*, 467 P.2d 5 (N.M. 1970), on which Ag Services now relies.

We are not aware of any case in which liability on the theory of partnership by estoppel has been imposed in the face of specific admissions by the creditor that it believed that the putative partners had some specific arrangement *other than* a partnership. We conclude that the district court erred in imposing liability based on representations that Nielsen would be "in business" with Lundell, when the undisputed evidence showed that Ag Services had a specific understanding that the relationship between the two was to be something other than a partnership.

We turn to the other alternative under the New Mexico statute, which involves representations of partnership made publicly. This category of partnership law in New Mexico was the subject of learned and respectful criticism by the intermediate appellate court of that state in the recent case of *Cheesecake Factory, Inc. v. Baines*, 964 P.2d 183, 186-190 (N.M. Ct. App. 1998). The particular point of controversy

was whether a plaintiff asserting partnership by estoppel based on public representations not made to the plaintiff must prove reliance on the belief that a partnership existed, as a plaintiff must do when asserting that a private representation of partnership was made directly to him. As one other court has noted, the notion that reliance should not be necessary in the public representation situation when it is necessary in the private representation situation is illogical. *National Premium Budget Plan Corp. v. National Fire Ins. Co.*, 234 A.2d 683, 729-732 (N.J. Super. Ct. Law Div. 1967), *aff'd*, 254 A.2d 819 (N.J. Super. Ct. App. Div. 1969). Nevertheless, forceful dictum from the New Mexico Supreme Court indicated that reliance need not be shown in a case based on public representations. *See Gilbert v. Howard*, 326 P.2d 1085, 1087 (N.M. 1958).

We believe that we must assume for purposes of this case that reliance is *not* required. Notwithstanding the force of the arguments in *Cheesecake Factory* and *National Premium*, we are bound by the considered dicta of the states' supreme courts as well as by their holdings; see Hawks v. Hamill, 288 U.S. 52, 58-59 (1933); Hardy Salt Co. v. Southern Pacific Transportation Co., 501 F.2d 1156, 1163 (10th Cir. 1974). We do not believe that it is our position to predict that the New Mexico Supreme Court would overrule its precedent in the complete absence of any indication *from that court* of its inclination to do so.[10]

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[10] We note that this is an issue unlikely to recur. That is because the Revised Uniform Partnership Act, since adopted in New Mexico, removes any doubt that reliance is required. *See* N.M. Stat. Ann. § 54-1A-308 (Michie 1999 Supp.).

Commenting on the public representation alternative for proving partnership by estoppel, the New Mexico Supreme Court has said that this doctrine

> extends liability beyond the common-law test of reliance so that when one has by his acts or his consent to the acts of others allowed or caused the general community to believe that he is a partner, then he is such by estoppel even though this particular creditor may not have heard the representation. . . . . However, *this test demands that the representations have been made in a "public manner" at the time that credit was extended so that at that time it was general community knowledge* even though the representations might not have been communicated to this particular creditor.

Gilbert v. Howard, 326 P.2d at 1087 (emphasis added).[11]

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[11] We note in passing that there has apparently been no effort to define the "general community" in this transaction between an Iowa lender (Ag Services), a borrower residing in Arizona or Utah when he was not in active military service (Lundell), and an alleged co-obligor living in Nebraska (Nielsen), all of whom were involved in farming in New Mexico. There is reason to doubt that the public representations identified by the trial court became "general community knowledge" in any community which included Ag Services.

The district judge did not make an explicit finding that the general community had come to believe that Nielsen and Lundell were partners, but assuming that such a finding was implied, we see very little support in the evidence for it. We do note, however, that there was some evidence that trade creditors in the Clovis area may have believed that Nielsen and Lundell were partners. We will assume, for purposes of our analysis, that Lundell and Nielsen came to be viewed as partners by suppliers in the Clovis area during the course of the 1992 crop season, which we believe the evidence taken in the light most favorable to Ag Services established. This is insufficient to support the judgment, however, because the representations must have been publicly made in the "general community" at the time that credit was extended. *See Gilbert,* 326 P.2d at 1087. No evidence has been identified, and we have found none, which would establish that the representations had become public knowledge before credit was extended, nor did the district court make such a finding. Consequently Nielsen may not be held liable as a partner by estoppel.

VI

We are also persuaded the district court erred in ruling that Nielsen was liable under the theory of piercing the corporate veil. Piercing the corporate veil is an equitable remedy. *See Scott v. AZL Resources, Inc.*, 753 P.2d 897, 900 (N.M. 1988); *Harlow v. Fibron Corp.*,671 P.2d 40, 43 (N.M. Ct. App. 1983). The effect of application of the doctrine is to hold a shareholder, officer or director personally liable for an obligation of the corporation. Because the liability is derivative, the liability of the shareholder cannot exceed that of the corporation. *See Eastridge Dev. Co.*

v. Halpert Assoc., Inc., 853 F.2d 772, 782 (10th Cir. 1988). In the instant case, other than the jury's verdict on conversion, no liability of the corporate entity, DHFC, existed for which Nielsen could be held liable as it was Lundell's obligation to repay the loan. The district court's findings and conclusions do not include any imposition of liability on the corporation, *nor do they purport to find Nielsen liable for the jury verdict against DHFC.*

The second requirement for piercing the corporate veil is that the corporate form was used for an improper purpose. The improper purpose must be that of the parent corporation or the shareholder against whom the remedy is sought. *See Scott v. AZL Resources*, 753 P.2d at 901; *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993) (applying federal law). The district judge clearly was of the opinion that Nielsen used the corporate form to perpetrate a fraud on Ag Services, as we noted in Part IV, *supra*. We are unable to reconcile that view of the evidence with the verdict of the jury, however. And, we note that the district court's findings rested largely on the informal manner of doing business, including financing the endeavor through loans from the principals in lieu of capitalization. Where undercapitalization is substantially a consequence of financing the business through loans rather than capital contributions, New Mexico cases have cautioned that "supplying money to a losing business does not constitute an improper purpose." *Scott v. AZL Resources*, 753 P.2d at 901; *see also Harlow v. Fibron Corp.*, 671 P.2d at 44.

We conclude that the judge's finding of improper purpose is irreconcilable with the jury verdict. Moreover, as we have noted, the district court erred by imposing on

Nielsen as a shareholder a liability which was not a corporate liability. The judgment must be reversed insofar as it is based on this theory.

Conclusion

We believe that the jury verdict in favor of Nielsen, in light of all the particular circumstances of this case, precluded judgment against him on the equitable theories presented to the district court. We therefore hold that the judgment against defendant/appellant Nielsen must be reversed. On remand, the district court should enter judgment in favor of Nielsen on all claims. The judgment against DHFC is undisturbed, it having abandoned its appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed February 16, 1999]

No. CIV 96-1637 JC/WWD

AG SERVICES OF AMERICA, INC., an Iowa corporation,
Plaintiff,

v.

JOHN D. NIELSEN, a/k/a JACK NIELSEN, DIAMOND HILL FARMS, CLOVIS INC., a New Mexico corporation,
Defendants.

JUDGMENT

The Court's Findings of Fact and Conclusions of Law were entered this date. John D. Nielsen shall be personally liable to Ag Services for repayment of $323,352.00 of Frito-Lay, Clover Club and Borden proceeds and $89,000.00 of packaging inventory for a total of $412,352.00, plus interest theron at the rate of 10% (ten percent) per annum, compounded annually from January 1, 1993 until paid. This sum includes the $162,000.00 jury award.

Ag Services shall recover its costs of litigation from John D. Nielsen.

If this judgment is appealed, and the appellate court finds that this Court, in determining equitable claims and relief, is bound by the jury's $162,000.00 award against Diamond Hill Farms, Clovis, Inc. for conversion, then this Court finds that defendant John D. Nielsen should be held personally liable to Ag Services for the jury verdict sum of $162,000.00 against Diamond Hill Farms, Clovis, Inc., plus interest thereon at the rate of 15% (fifteen percent) per annum, compounded annually, from January 1, 1993 until paid.

/s/_____
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed February 16, 1999]

No. CIV 96-1637 JC/WWD

AG SERVICES OF AMERICA, INC., an Iowa corporation,
Plaintiff,

v.

JOHN D. NIELSEN, a/k/a JACK NIELSEN, DIAMOND HILL FARMS, CLOVIS INC., a New Mexico corporation,
Defendants.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Plaintiff, Ag Services, is an Iowa corporation with its principal place of business located in Cedar Falls, Iowa.

2. The defendant, John D. Nielsen, a/k/a, Jack Nielsen ("Nielsen"), is a resident of the State of Nebraska. Defendant John D. Nielsen has conducted most of his business as a proprietorship under the trade name Diamond Hill Farms.

3. On or about August 16, 1991, Terry Lundell ("Lundell"), for adequate consideration, made, executed, and delivered to Ag Services a master Promissory Note in the original maximum amount of $600,000.00 (the "Note"), for the purpose of financing the sale of agricultural inputs to Lundell by Ag Services and cash advances made to Lundell by Ag Services necessary to carry out Lundell's New Mexico farming operations, and that the Note was subsequently amended by an Agreement to Supplement Promissory Note on or about January 13, 1992, to increase the maximum amount under the Note to $800,000.00. The amount actually loaned to Lundell was $787,979.22.

4. In order to secure the $800,000.00 Note, Lundell made, executed and delivered to Ag Services two Agricultural Security Agreements. Pursuant to the terms of said agreements, Lundell pledged to Ag Services a security interest in, among other things, all growing crops, harvested crops, inventory, account receivables, contract rights, general intangibles, farm products, seed, fertilizer, chemicals and inputs grown on the farm.

5. Ag Services filed financing statements and amendments thereto with the County Recorder Offices in, among others, Curry and Roosevelt Counties, New Mexico, on September 24, 1991 and September 3, 1992. On or about September 24, 1991, Ag Services filed an Effective Financing

Statement ("EFS") with the office of the Secretary of the State of New Mexico, covering wheat, potatoes and corn grown by Lundell in Curry and Roosevelt Counties, New Mexico, for the 1992 crop year. The description of collateral contained in the financing statements and effective financing statement was adequate to place third parties, including defendants, on notice that Ag Services had claimed a security interest in all of Lundell's crops grown in 1992 in Curry County or Roosevelt County, New Mexico, including his potatoes, grown potatoes, harvested potatoes and in all seed potatoes, chemicals, fertilizers, and other farm supplies, and in all of the proceeds received from the potatoes. On or about July 10, 1992, Lundell executed a First Amendment to Agricultural Security Agreement which supplemented the legal description of real estate. Ag Services filed amended financing statements on September 3, 1992 with the County Recorder Offices in Curry and Roosevelt Counties, New Mexico. The Notice provides that all payments under the Note are to be made to Ag Services at Post Office Box 668, Cedar Falls, Iowa 50613.

6. On or about December 30, 1991, Lundell executed a Farm Lease Agreement with Jeffrey M. Jorde, Sandhill Potato Co., and Sandhill Produce, Inc., to lease for agricultural purposes approximately 4,525 net irrigated acres and associated dry land comers of farmland (the "Leased Farm"). Approximately 1,089 acres of potatoes were grown upon the farm leased by Lundell from Mr. Jorde in crop year 1992. The remaining approximately 3,436 acres were used by Lundell, or his sublessees, to grow corn, wheat, beans, alfalfa and peanuts. The Farm is primarily valuable and used to grow potatoes, which are its most valuable cash crop. Potatoes can only be grown on the same field once every four years and

crop rotation is important. Therefore, it rakes an approximately 4,000 acre farm to produce 1,000 acres of potatoes, on an annual basis.

7. On or about July 21, 1992, Ag Services mailed Diamond Hill Farms, Box 7, Alliance, Nebraska, a Notice of Security Interest of Ag Services' security interest in the potatoes grown by Lundell on the Leased Farm which was received by Nielsen on or about July 27, 1992.

8. Ag Services advanced at least $1,611,393.00 for use in growing potatoes during the 1992 season.

9. Nielsen acknowledged that Ag Services' advances and loan were business obligations in conversations with Ag Services, including on January 2, 1992; June 5, 1992; July 30, 1992; September 27, 1992; November 24, 1992, and others. Nielsen had "no problem" with Diamond Hill Farms, Clovis, Inc. paying Ag Services the $50,000.00 of potato proceeds in October, 1992, and assured Ag Services as late as November, 1992, that he saw no problem with Ag Services' getting paid.

10. Lundell likewise acknowledged that Ag Services' advances and loan were business obligations, and assured Ag Services that they would be repaid. Lundell told Ag Services that the loan would be repaid from advance potato contracts totaling $914,077.00 with Frito-Lay, the U.S. Government, Canadian, Borden and Tom's.

11. Landell and Nielsen each told Ag Services that they had reached an agreement to farm the 1992 Clovis potato farm in early January, 1992, and Ag Services extended

substantial credit to Lundell, who was the lessee and farm operator of record. Unbeknownst to Ag Services, defendant Nielsen purported to form a corporation called Diamond Hill Farms, Clovis, Inc. on or about February 24, 1992. Ag Services was not informed of the existence of the Diamond Hill Farms, Clovis, Inc. corporation or that the corporation purportedly leased the potato acreage and operated the farm until December, 1992. Lundell did not inform Ag Services of the existence of the corporation became he didn't think it had been finalized.

12. Although Articles of Incorporation of Diamond Hill Farms Clovis, Inc. were filed with the New Mexico State Corporation Commission on February 24, 1992, the potato business was never operated as a corporation. Neither Nielsen nor Lundell paid any capital contribution to initially fund the corporation. Basically all money paid into the corporation by either individual was in the form of a loan. In actuality, this money did not go to a corporate identity but to the partnership or joint venture that Nielsen and Lundell maintained to grow potatoes.

13. According to Nielsen, the corporation was formed to own the potatoes for the purpose of impairing or cutting off Ag Services' security interest in Lundell's potatoes and thereby evading any obligation of repaying Ag Services' existing loan from potato proceeds. Nielsen knew of Ag Services' existing loan and of its "blanket security agreement" in Lundell's potatoes, and formed the corporation so that the potatoes would be transferred to and owned by the corporation, rather than Lundell.

14. The required formalities of a corporation were not observed or followed by the shareholders, officers, or directors in the operation of Diamond Hill Farms, Clovis, Inc. No formal board of directors' meetings were ever called or held, and no shareholders' meetings were ever called or held. Nielsen and Lundell were also required to contribute payment of the expenses of growing the potato crop on a 50/50 basis. These payments were not capital contributions to the corporation, but individual payments of expenses.

15. Nielsen admits that, as part of his original agreement with Lundell, Nielsen was to keep the Frito-Lay proceeds received from Clovis potatoes as partial reimbursement for his contributions to the corporation. This arrangement evidences a total disregard of the corporate entity from the outset and shows that Nielsen made no contributions to the corporation, but only temporary loans.

16. A checking account was opened in the name of Diamond Hill Farms, Clovis, Inc. on or about June 19, 1992 at First National Bank of Clovis, and withdrawals were done at the whim of its principals, for non-corporate purposes. The first deposit of funds into the Diamond Hill Farms, Clovis, Inc. checking account occurred in late July. Prior to July 31, 1992, Diamond Hill Farms, Clovis, Inc. paid none of the expenses to grow the potatoes, and the expenses were paid by Ag Services or by Nielsen, d/b/a Diamond Hill Farms, or Lundell Nielsen's payment of these "corporate" expenses shows that he believed them to be personal liabilities.

17. Virtually all of the purported corporate funds were commingled with non-corporate funds. Approximately $1,777,377.00 of potato proceeds were deposited into the

Diamond Hill Farms, Clovis, Inc. checking account after July 31, 1992. Of these, $1,620,000.00 was subsequently commingled with funds from non-corporate accounts, and was transferred from the corporate checking account to Lundell's checking account. Potato expenses were actually paid from Lundell's checking account. Nielsen controlled and commingled the remaining $323,352.00 in Frito-Lay potato proceeds he received with his own funds in his FirsTier account, in disregard of the corporate entity.

18. Nielsen himself did not treat the corporation as a separate entity. Nielsen and his farm manager, Higgins, and other creditors of the business, frequently referred to Lundell and Nielsen as "partners", and Nielsen frequently referred to the business as a "joint venture" or partnership, not a corporation. Higgings referred to Lundell as Nielsen's "partner" in each of the 13 monthly invoices sent to Nielsen from January, 1992, to February, 1993, describing his work. Paragraph 15 of Higgins' management contract with Diamond Hill Farms also referred to the potato business as a "partnership" between Lundell and Nielsen. Nielsen verbally accepted the management contract. Nielsen characterized the Clovis business as a farming "joint venture" in his 1992 personal financial statements submitted to FirsTier Bank. Nielsen relied upon the assets of the joint venture in obtaining credit from his bank. Nielsen's loan officer, S. Anderson, testified that FirsTier relied upon the $399,500.00 assets of the joint venture in extending credit to Nielsen in 1993.

19. The purchase orders for supplies ordered by the Clovis business were on forms that identified the business as Diamond Hill Clovis, and did not indicate a corporate entity.

20. Crop insurance for the potato crops was obtained by and in the name of Terry Lundell, personally, and not for Diamond Hill Farms, Clovis, Inc.

21. On or about May 1, 1992, Higgins signed and filed a certified Farm Report form with the Clovis USDA ASCS office. The Report identified Lundell as the operator and producer of the entire farm, including all potato acreage, and did not state that Diamond Hill Farms, Clovis, Inc. operated the potato acreage. Higgins "certified to the best of my knowledge and belief that the acreage of crops and land uses listed herein are true and correct." On or about July 14, 1992, Higgins signed and filed another Farm Report form with the United States Department of Agriculture ASCS Clovis office. This form also identified Lundell as operator and producer of the farm, including all potato acreage, and excluding certain corn and peanut acreage operated by Eugene and Harold Heflin. Higgins again certified the report was true and accurate. On or about July 17, 1992, Ag Services requested a report of farm bases, yields and planted acreage of the USDA ASCS Clovis office. In response, the USDA sent Ag Services Form ASCS-423 and Form ASCS-424 which identified Lundell as operator and producer of all the potato acreage.

22. No state or federal income tax return was filed by Diamond Hill Farms, Clovis, Inc. in any state for the years 1992, 1993, 1994, 1995, 1996, or 1997. The corporation only filed one initial profit report. Diamond Hill Farms, Clovis, Inc. ceased doing business after the conclusion of the 1992 crop year, and is presently not doing business.

23. Nielsen's and Lundell's wrongful use of the corporation and disregard of corporate entity caused Ag Services' damages and caused its Note to remain unpaid.

24. Nielsen received and kept $323,352.72 in payments from Frito-Lay, Borden and Clover Club from the sale of potatoes grown by the corporation during the 1992 crop year.

25. The corporation also owned $89,019.13 worth of packing inventory at the conclusion of the 1992 crop year. Nielsen received approximately $11,966.00 worth of the packing inventory, sold approximately $30,000.00 worth of the packing inventory to landlord Jeff Jorde, and claims to own personally the remaining packing inventory for a total benefit of $89,000.00.

26. Nielsen's receipt of the $323,352.00 Frito-Lay, Borden and Clover Club potato proceeds, and the $89,000.00 worth of packing inventory constitute an unlawful preference to an officer or director to the damage and detriment of Ag Services, and he must disgorge those proceeds to Ag Services.

27. On December 15, 1992, Bruce Nelson, Ag Services' collection manager, demanded Nielsen repay any of the potato proceeds he had received from the 1992 crop year. At that time, Nielsen knew or should have known that Ag Services was demanding and seeking repayment of the Note from Nielsen, including repayment of any proceeds Nielsen had or received.

28. Ag Services knew that Lundell was using funds covered by its Agriculture Security Agreements to pay other creditors. Ag Services acquiesced in these payments.

29. Nielsen personally controlled and improperly kept and received the benefit of corporate assets totaling $323,352.00 of Frito-Lay proceeds, and the $89,000.00 packing inventory, for a total benefit received of $412,352.00 which was to Ag Services' detriment and has proximately caused Ag Services' damages.

30. Ag Services is entitled to a judgment against Nielsen in the amount of $323,352.72, plus $89,000.00 packing inventory for a total of $412,352.00, plus interest thereon from January 1, 1993 to present at the rate of 10% per annum, compounded annually, under common law and NMSA 1978 Sections 56-8-3(B) and 56-8-4(A).

31. Lundell testified that he and Nielsen operated as a "partnership" the entire year. According to Nielsen, the Clovis business with Lundell was initially a partnership, and Nielsen prepared a "Clovis Business Concept" document which details the terms of the partnership agreement. On January 21, 1992, Nielsen's notes indicate that the business was a partnership as of that time.

32. As set forth in the previous findings, Nielsen publicly, knowingly and voluntarily held himself out to be Lundell's business associate in their 1992 potato operation, through actions, conduct and words, and also allowed himself to be represented by others as Lundell's business associate, throughout the 1992 crop year, by their actions, conduct and words.

33. In December, 1991 and January, 1992, Ag Services understood that Lundell and Nielsen were in the potato business together based upon Nielsen's, Lundell's and Higgens' representations to Ag Services from December, 1991 to January, 1992, and Ag Services extended credit to the business in reliance upon those representations.

34. In early January, 1992, Nielsen informed Ag Services that he had 30 years of experience in the potato business, and that he was well aware of the problems in the potato industry and market. He stated that his operation had very respectable and profitable years even with low prices. He stared that he had come to a verbal agreement with Lundell on the Clovis operation, and Nielsen was going to be in charge of management, equipment, planting and harvesting of the potato crop. Higgins was going to manage the operation, and they expected profit in the business. Ag Services extended credit to the business in reliance upon the foregoing representations.

35. Neither Nielsen nor Lundell informed Ag Services that a corporation was set up to operate Lundell's and Nielsen's farm until December, 1992.

36. Ag Services is entitled to damages in *quantum meruit* because Nielsen knew of Ag Services' loan and expectation of repayment of its loan, yet Nielsen wrongfully kept the $323,352.72 of proceeds from the business, and the $89,000.00 worth of packing inventory. Nielsen is not entitled to retain those benefits, even if Ag Services' security agreement with Lundell is invalid as to some of the acreage due to a mistaken legal description in the Security Agreement or because of multiple subleases of the farm land or due to the

formation of Diamond Hill Farms, Clovis, Inc. during the season or for other reasons.

37. Ag Services filed its Complaint against defendants on November 22, 1996. Lundell's note to Ag Services was not due and payable until December 15, 1992. Consequently, Ag Services' Complaint was timely filed because it was filed within four years of the date of default of the Note.

38. In November, 1992 Nielsen again informed Ag Services that there were plenty of potato proceeds remaining and that Ag Services would be paid. Nielsen led Ag Services to believe that he and Lundell just needed to meet to divide the proceeds and write checks.

39. On December 15, 1997 Nielsen told Ag Services for the first time that the Clovis potato operation was actually operated by a separate corporation called Diamond Hill Farms, Clovis.

40. Ag Services lacked knowledge until some time after November 23, 1992, that (1) there were few potato proceeds left, (2) that there was no separate Nielsen operation in Clovis; (3) that Nielsen's alleged sublease was a backdated, altered and sham document: (4) that the Clovis potato operation was actually operated by Nielsen and Lundell as one unit at all material times; (5) that Nielsen used Ag Services' loan funds on all of the potato acreage, or (6) that the purported corporation was a sham and the operation was actually operated as a joint venture or partnership.

41. Ag Services lacked knowledge that a corporation was involved, that the Lunden Note would be unpaid or that no proceeds would be paid Ag Services until after November 23, 1992. Therefore, Ag Services' cause of action for piercing the corporate veil, partnership by estoppel, or *quantum meruit*, did not accrue until sometime after November 22, 1992.

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter of this case.

2. The corporate entity of Diamond Hill Farms, Clovis, Inc. shall be and is disregarded because the corporation was formed and is being used for improper or wrongful purposes, as set forth in *Garcia v. Coffman*, 124 N.M. 12, 946 P.2d 216 (1997). The corporate entity did not exist at the time Lundell and Nielsen agreed to the 1992 potato venture or when Ag Services extended substantial credit to their business and was formed thereafter for the wrongful purpose of avoiding such debt or obligation, and perpetuating injustice upon Ag Services.

3. The financial structure of Diamond Hill Farms, Clovis, Inc. was also a sham, and the corporation was vastly undercapitalized. Lundell and Nielsen disregarded the corporate entity themselves and did not observe or follow corporate formalities, the corporation was controlled and dominated by Nielsen, and was operated as his alter ego.

4. Nielsen and Lundell each represented to Ag Services and others that they were in business together in

December, 1991 and January, 1992 and Ag Services extended substantial credit to Lundell, in reliance thereon. Nielsen's and Lundell's 1992 potato business in Clovis was operated as a partnership or joint venture, with all expenses and revenues pooled at the end of the year, and with each principal liable for the profits or losses. Nielsen, by virtue of his representations, action and conduct, is estopped from denying he was Lundell's partner in the 1992 Clovis operation.

5. Nielsen is personally liable to Ag Services for repayment of the $323,352.00 of Frito-Lay, Clover Club and Borden proceeds, and the $89,000.00 of packing inventory, for a total of $412,352.00, plus interest thereon at 10% per annum, compounded annually, from January 1993 until paid. This sum includes the $162,000.00 awarded by the jury.

6. Ag Services' claims are not barred by the statute of limitations, waiver, estoppel or laches or any other affirmative defenses due to defendants' aforesaid misrepresentations, misconduct, concealment of material facts and other misconduct.

7. Ag Services is entitled to its costs of litigation.

8. In the event this matter is appealed, and upon appeal, the appellate court finds that this Court, in determining equitable claims and relief, is bound by the jury's $162,000.00 damage award against Diamond Hill Farms, Clovis, Inc. for conversion, then the Court finds as follows: Defendant Nielsen should be held personally liable to Ag Services under piercing the corporate veil, partnership by estoppel and in *quantum meruit* payment of the $162,000.00

verdict Diamond Hill Farms, Clovis, Inc., plus interest thereon at the rate of 15% per annum, compounded annually, from January 1, 1993 until paid.

/s/_____
CHIEF UNITED STATES JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed July 13, 1998]

No. CIV 96-01637 JC/WWD

AG SERVICES OF AMERICA, INC., an Iowa corporation,
Plaintiff,

v.

JOHN D. NIELSEN, a/k/a JACK NIELSEN, DIAMOND HILL FARMS, CLOVIS INC., a New Mexico corporation,
Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (PIERCING THE CORPORATE VEIL, PARTNERSHIP BY ESTOPPEL, *QUANTUM MERUIT*)

Proposed Findings of Fact

Defendants Jack Nielsen and Diamond Hill Farms, Clovis, Inc. respectfully submit these proposed findings of fact and conclusions of law. These findings and conclusions

are limited to the three issues that are equitable and to be tried to the Court: Piercing the Corporate Veil, Partnership by Estoppel, and *Quantum Meruit*. Defendants may seek to amend these findings and conclusions following trial in order to properly reflect the evidence introduced at trial.

1. Terry Lundell ("Lundell") and Defendant Jack Nielsen ("Nielsen") agreed in early 1992 to form a corporation to farm potatoes in the Clovis, New Mexico area on a farm owned by Jeffrey Jorde and leased to Lundell.

2. On February 24, 1992, the Articles of Incorporation of Diamond Hill Farms, Clovis, Inc. ("DHF Clovis, Inc.") were filed with the New Mexico State Corporation Commission. (Undisputed Fact 11, Pretrial Order.)

3. In late February 1992, Nielsen and Lundell met and formulated the operational plan for DHF Clovis, Inc.

4. In 1992, the income and expenditures of DHF Clovis, Inc. was accounted for separately by Lundell's bookkeeper, Shirley Billings, but were included within the overall accounting for the entire farm operation.

5. In 1992, DHF Clovis, Inc. adopted bylaws.

6. DHF Clovis, Inc. filed a timely corporate report in 1992 with the New Mexico State Corporation Commission.

7. DHF Clovis, Inc., on April 23, 1992, filed a timely Subchapter S election with the United States Internal Revenue Service.

8. In 1992, DHF Clovis, Inc. established a bank account in its own name at First National Bank, Clovis, New Mexico. (Undisputed Fact 16, Pretrial Order.)

9. In 1992, DHF Clovis, Inc. invoiced approximately $1.7 Million in potato sales to customers using invoices which identified itself as "Diamond Hill Farms, Clovis, Inc."

10. In 1992, DHF Clovis, Inc. deposited approximately $1.7 Million of potato sales proceeds in its bank account. (Undisputed Fact 17, Pretrial Order.)

11. Ag Services received check No. 1025 from DHF Clovis, Inc. in the amount of $30,000 on or about October 5, 1992. (Undisputed Fact 9, Pretrial Order.)

12. Ag Services received a second check from DHF Clovis, Inc., check No. 1026, in the amount of $20,000 on or about October 12, 1992. (Undisputed Fact 10, Pretrial Order.)

13. No document published by or for Nielsen identified DHF Clovis, Inc. as a partnership to any of the persons or entities with which DHF Clovis, Inc. did business.

14. On December 28, 1992, the New Mexico Corporation Commission issued a Certificate of Good

Standing and Compliance as to "Diamond Hill Farms, Clovis, Inc."

15. In 1992, Nielsen was a 50% stockholder, president and director of DHF Clovis, Inc. (Undisputed Fact 12, Pretrial Order.)

16. In 1992, Nielsen was a 50% stockholder, vice-president and director of DHF Clovis, Inc. (Undisputed Fact 13, Pretrial Order.)

17. In 1992, Barbara Nielsen was the Secretary of DHF Clovis, Inc. (Undisputed Fact 14, Pretrial Order.)

18. In filing his federal tax return in 1992, Nielsen listed a loss from DHF Clovis, Inc.'s operation as a Subchapter S corporation loss.

19. Nielsen and Lundell ceased doing business with one another at the end of 1992, and DHF Clovis, Inc. ceased active operations in very early 1993.

20. Lundell formally resigned from the corporation by a letter sent by his attorney, Max Best, in December 1992.

21. The corporation was not insolvent in 1992.

22. The corporation was not thinly or inadequately capitalized in 1992.

23. The corporation was not controlled exclusively by Nielsen. The corporate officers controlled the corporation.

24. Nielsen received no preference or any improper reimbursement of capital contribution. He only received some reimbursement for his expenditures he provided to the corporate venture.

25. During the course of the operation of the corporation Nielsen advanced money to keep it in operation.

26. At the time credit was extended to Lundell by Ag Services in early 1992, Ag Services did not believe that Lundell and Nielsen had created a partnership entity, nor had anyone represented to Ag Services that such a partnership existed.

27. Credit was extended to Lundell alone, and Ag Services did not attempt to have Nielsen join in the debt or guarantee the loan.

28. Nielsen made no representations in a public manner that a partnership existed between Lundell and himself at or before the time Ag Services extended credit to Lundell.

29. Nielsen did not consent to partnership representations being made in a public manner at or before the time Ag Services extended credit to Lundell, nor were any such representations made.

30. On or about August 16, 1991, Lundell, for adequate consideration made, executed and delivered to Ag Services a Master Promissory Note in the original maximum amount of $600,000.00 (the "Note"), for the purpose of financing the sale of agricultural inputs to Lundell by Ag

Services and cash advances made to Lundell by Ag Services necessary to carry out Lundell's New Mexico farming operations, and that the Note was subsequently amended by an Agreement to Supplement Promissory Note on or about January 13, 1992 to increase the maximum amount under the Note to $800,000.00. (Undisputed Fact 5, Pretrial Order.)

31. The $800,000.00 Note is the loan which is the basis for Ag Services' suit herein.

32. It was not general community knowledge that Lundell and Nielsen were in a partnership relation at the time Ag Services extended credit to Lundell.

33. Nielsen provided over $600,000.00 worth of cash and labor and other equipment input into the 1992 DHF Clovis, Inc. corporate venture. He has received no return on this expenditure, other than approximately $300,000.00 in potato proceeds and unused packing materials. Mr. Nielsen, therefore, lost over $300,000.00 on the corporate venture; and, in addition, has lost the use of that money since its expenditure in 1992.

34. As of the close of business July 31, 1992, Ag Services' records indicate that the account balance for Lundell's account No. 20401 was $787,979.22, and that between that date and July 1, 1996, Ag Services received a total of $574,009.76 of payments of this account.

35. The $787,979.22 does not represent actual expenditures by Ag Services, as it includes markups on agricultural inputs provided by Ag Services.

36. Ag Services made a net profit of over $200,000.00 on the sale of Lundell's Colorado property, which Ag Services does not reflect in its account balance.

37. Ag Services received between $20,000.00 - $80,000.00 of value by settling a claim against Jeff Jorde, which arose out of the loan transaction between itself and Lundell; and, in addition, obtained the dismissal of a claim made by Mr. Jorde against Ag Services.

38. Ag Services also settled its claims against Lundell in return for Lundell dismissing his claim against Ag Services for over $600,000.00.

Conclusions of Law

Partnership by Estoppel

1. Considering the severe consequences of partnership liability, the doctrine of partnership by estoppel should be applied only with great care.

2. Ag Services did not extend credit to Lundell on the basis of partnership representation.

3. Nielsen did not make or consent to partnership representations being made in a public manner.

4. Plaintiff has failed to establish partnership by estoppel and its claim should be denied.

Piercing the Corporate Veil

1. The issuance of a Certificate of Incorporation is conclusive evidence that all conditions precedent required to be performed by the incorporation have been complied with and that the corporation has been properly incorporated.

2. DHF Clovis, Inc. was not under the domination nor was it the alter ego of Nielsen. He did not so manipulate it to further his own individual interest that the identity of the corporation merged into him.

3. DHF Clovis, Inc. was not set up for a fraudulent or improper purpose. The fact that incorporation was desired in order to obtain limited liability is not an improper purpose.

4. Ag Services was not proximately harmed by DHF Clovis, Inc.'s use of the corporate form.

5. Recognition of DHF Clovis, Inc. would not result in inequity or sanction fraud.

6. The Court declines to pierce the corporate veil or disregard the corporate existence of DHF Clovis, Inc.

Quantum Meruit

1. Defendants were not unjustly enriched by the retention and use of potato proceeds.

2. Justice does not require a grant of restitution in *quantum recruit* to Ag Services.

3. Ag Services' claim for *quantum meruit* relief should be denied.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

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APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed December 18, 2000]

No. 99-2081

AG SERVICES OF AMERICA, INC., an Iowa corporation,
Plaintiff-Appellee,

v.

JOHN D. NIELSEN, a/k/a JACK NIELSEN and DIAMOND HILL FARMS, CLOVIS, INC., a New Mexico corporation,
Defendants-Third-Party Plaintiffs-Third-Party Counter-Defendants-Appellants,

v.

TERRY LUNDELL,
Third-Party Defendant-Third-Party Counter-Claimant.

ORDER ON REHEARING

Before **MURPHY** and **HOLLOWAY**, Circuit Judges, and **COOK**, District Judge.*

On consideration of the petition for rehearing *en banc* filed by Plaintiff Appellee AG Services of America, Inc., the court finds and concludes as follows:

The petition argues that our opinion conflicts with more recent Tenth Circuit decisions on the scope of issue preclusion, relying on the well-established rule cited in *Turney v. O'Toole*, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990), that issue preclusion applies only to issues actually and necessarily decided by the prior case. Our opinion also applied that same rule and the asserted conflict with our other precedents is not present. Our opinion is consistent with *Turney* because, as we explained, *any and all* implications from the jury verdict here were found to be fundamentally inconsistent with critical findings by the trial judge. *See* Opinion at 14 ("[A]ny explanation for the jury's decision that Nielsen did not convert the Frito-Lay proceeds leads inexorably to the conclusion that the jury found no wrongdoing by Nielsen.").[1]

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* The Honorable H. Dale Cook, Senior United States District Judge of the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

[1] Our opinion cited our other precedents which are harmonious with *Turney* and its reasoning that "collateral estoppel applies only to issues which have been actually and necessarily decided." *Turney*, 898 F.2d at 1472 n.1. Our opinion recognizes

The petition also argues that the jury might have made findings for Nielsen on defenses raised at trial, for example the defense of limitations, which would not have conflicted with the trial judge's findings on the equitable claims. This argument (which was previously made and was rejected, rather than having been ignored) does not withstand analysis. If it is assumed, *arguendo*, that the jury's decision was based at least in part on limitations, it is necessary to consider whether that could have been the sole basis for the general verdicts. In pondering that question, we conclude that the answer must be in the negative. Because the jury returned a verdict in favor of AG Services and against DHFC on the conversion claim, it is apparent that the jury found that the conversion claim was not barred in its entirety. Thus, to the extent that the verdicts were based on limitations, the jury must have found that DHFC, but not Nielsen, was estopped from relying on limitations, based on the instructions of the court. *See* I Aplt. App. 350-51.[2]

---

that rule by citing *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1273 (10th Cir. 1995); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1442-43 (10th Cir. 1988); and *Butler v. Pollard*, 800 F.2d 223, 224-26 (10th Cir. 1986).

[2] Instruction 8-AC told the jurors, *inter alia*, that a party is estopped from relying on the statute of limitations if that party is guilty of "conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert." The estopped party must also have intended that the other party rely on that conduct while himself having actual or constructive knowledge of the real facts. I Aplt. App. 351.

If then, the verdict in favor of Nielsen is assumed, *arguendo*, to have been based on limitations, the jury under that hypothesis must have found that Nielsen did not engage in conduct which amounted to a false representation or concealment of material facts or conduct calculated to convey an impression that the facts were inconsistent with what he now asserts. We are persuaded that such an implied finding completely undercuts the trial judge's basis for the findings that Nielsen had misused the corporate entity or otherwise committed conduct which made his "enrichment" unjust.

Accordingly, this panel orders that the petition for rehearing is denied. The suggestion of rehearing *en banc* having been submitted to the members of the panel and all the active judges of the court, and no judge having requested a poll on the suggestion, *see* Rule 35, Fed. R. App. P., rehearing *en banc* is denied.

Entered for the Court
Patrick Fisher, Clerk

By:
Keith Nelson
Deputy Clerk

Supreme Court, U.S.
FILED
APR 6 2001
OFFICE OF THE CLERK

(2)

No. 00-1449

In The

Supreme Court of the United States

AG SERVICES OF AMERICA, INC.,

Petitioner,

v.

JOHN D. NIELSEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the settled doctrine of Seventh Amendment issue preclusion by holding that certain of the prerequisites of the state law equitable claims could not be established due to factual determinations necessarily implied from the jury verdict.

2. Whether the Court of Appeals misapplied New Mexico law in determining that the trial court erred in imposing liability based on the state law doctrines of partnership by estoppel, *quantum meruit* (unjust enrichment) and piercing the corporate veil.

3. Whether Mr. Nielsen's agreement that state law equitable claims were to be tried to the court constituted a waiver of the right to assert issue preclusion based on a jury verdict on state law legal claims tried in the same action.

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RESPONDENT'S BRIEF IN OPPOSITION

This Court should deny the Petition for Writ of Certiorari which seeks review of the Tenth Circuit's reversal of the judgment of the district court.

RESTATEMENT OF THE CASE

The Factual Background of the Case

In late 1991, Mr. Nielsen, a resident of Nebraska, and Terry Lundell, a resident of Arizona, met and determined that they had a mutual interest in farming potatoes on a farm of approximately 1,100 acres near Clovis, New Mexico that Mr. Lundell was in the process of leasing. Mr. Nielsen and Mr. Lundell agreed to operate the business as a Subchapter S corporation known as Diamond Hill Farms Clovis Inc. ("DHFC"). A primary reason Mr. Nielsen wanted the business structured as a corporation was so that he would not be liable for Mr. Lundell's personal debts such as Mr. Lundell's loans from Ag Services of America, Inc. ("Ag Services"). The operational plan for the 1992 crop year involved both Mr. Lundell and Mr. Nielsen putting certain capital and in-kind contributions into the DHFC operation. They would then be repaid from any crop proceeds and would share equally in any profits or losses from the venture.

In addition to the potato acreage, Mr. Lundell individually farmed another 3,000 acres on the same farm, which he planted in corn, wheat and alfalfa, among other crops. Mr. Nielsen had no involvement with the farming operation on this acreage. The proceeds from both the

potato acreage and Mr. Lundell's own farm were both controlled by Mr. Lundell within his own personal bank account.

Mr. Lundell had an ongoing relationship with Ag Services, which is a nationwide agricultural lender and supplier of crop-growing supplies based in Iowa. Much of Mr. Lundell's contribution to the Clovis venture came from a loan he procured from Ag Services. Although Ag Services was aware that Mr. Nielsen and Mr. Lundell were involved together in the farming venture, Mr. Nielsen himself had no business relationship with Ag Services. Ag Services did not believe Mr. Nielsen and Mr. Lundell were involved in a partnership and did not advance loan funds to Mr. Lundell in the belief that Mr. Nielsen was himself liable for the debt. Ag Services did not request that Mr. Nielsen guarantee its loan to Mr. Lundell or become a co-maker or otherwise be responsible for the repayment of the loan.

During the course of the growing season both Mr. Lundell and Mr. Nielsen advanced considerable funds, products and in-kind services to the Clovis venture. Mr. Lundell contributed over $500,000 to the farming operation, much of which was obtained through his loan with Ag Services. Mr. Nielsen contributed over $720,000 to the planting, growing and harvesting of potatoes on the Clovis farm.

Ultimately, the crop was raised, harvested and sold. Although the income from the potato crop was slightly higher than the production costs, Ag Services received only $50,000 of the potato proceeds from Mr. Lundell. Mr. Nielsen received approximately $323,000 of proceeds and

$11,000 worth of burlap bags leaving him with a net loss from the venture in the neighborhood of $390,000. On the other hand, Mr. Lundell took $935,000 in proceeds which resulted in a significant overpayment of his contribution. Mr. Lundell acknowledged his receipt of funds in excess of his contributions and gave Mr. Nielsen a promissory note in the amount of $355,000. Mr. Nielsen later brought suit on this note in state court in Arizona and was granted judgment by default, but Mr. Nielsen has never received any payment on this judgment.

In the meantime, Ag Services sued Mr. Lundell in state court in Iowa for the balance due on the loan. That suit was settled with no cash payment from Mr. Lundell.

The Lawsuit and Its Resolution

Ag Services then instituted the instant diversity action in the United States District Court for the District of New Mexico. Ag Services' complaint sought $691,000 in damages plus punitive damages from defendants Nielsen and DHFC. Ag Services sued both Mr. Nielsen and DHFC on a conversion claim based on Ag Services' purported security interest in the potato crop. Ag Services also sued Mr. Nielsen on a number of other grounds including fraud and negligent misrepresentation and equitable claims of *quantum meruit*, partnership by estoppel and piercing the corporate veil. All claims were state law claims, not federal claims. The legal claims were tried to a jury in late July and early August 1998. The jury found for Mr. Nielsen on the conversion, fraud and negligent misrepresentation claims but found for Ag Services on the conversion claim against DHFC in the amount of

$162,000.[1] The jury had been instructed on corporate officer liability and had been instructed that should they find that Mr. Nielsen directed, controlled, approved or ratified the activity that led to the conversion by DHFC, they must find Mr. Nielsen liable for the corporate conversion. However, as indicated, the jury found in favor of Mr. Nielsen on the conversion claim.

Following the receipt of the verdict, the trial court held a non-evidentiary hearing on the remaining equitable claims. Although counsel for Mr. Nielsen argued that the equitable claims were barred by principles of Seventh Amendment issue preclusion, and that the equitable claims had not been established by the evidence, the trial court issued its judgment in February 1999 in which it found for Ag Services on the equitable claims and ordered judgment in the amount of $412,352 plus prejudgment interest computed at 10% per annum from January 1, 1993.

Mr. Nielsen appealed the judgment to the Tenth Circuit Court of Appeals and the Tenth Circuit reversed, holding that Seventh Amendment issue preclusion barred the judgment on the equitable claims of *quantum meruit* and piercing the corporate veil, and also held that the equitable claims were not adequately supported by the evidence or the trial court's findings.

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[1] At the close of evidence, the trial judge held that the punitive damages claim was unsupported by the evidence and dismissed it on that ground.

Ag Services filed a Petition for Rehearing *En Banc* in which it argued that the Court of Appeals decision conflicted with Tenth Circuit precedent regarding Seventh Amendment issue preclusion. In addition, Ag Services argued that the court's opinion was based on factual misunderstanding and overlooked findings and conclusions of the trial court. In denying rehearing, the Tenth Circuit held that its opinion was consistent with its earlier opinions and otherwise denied the request. *Ag Services of America, Inc. v. Nielsen*, 231 F.3d 726, *reh'g den.*, 235 F.3d 559 (10th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT.

A writ of certiorari should not issue because the Tenth Circuit Court of Appeals did no more than apply well-established principles of Seventh Amendment issue preclusion to state law equitable claims in a diversity action. The Court of Appeals decision breaks no new constitutional ground and does not conflict with earlier Tenth Circuit opinions, with opinions from other Circuits or with opinions issued by this Court.

Nor does the opinion conflict with any New Mexico state court decision on any federal question. Instead, Ag Services argues that the Court of Appeals misapplied state law equitable doctrines. Even if such misapplication is present, and we argue that it is not, certiorari is not available for a review of the application of state law by a federal court.

In sum, while certainly important to the parties, none of the issues presented in this commercial lending case involve the kind of public interest necessary for a writ of certiorari.

Finally, the Tenth Circuit did not err in its decision. Applying well-established theories of issue preclusion, the Court of Appeals prevented the trial judge from circumventing a jury verdict merely because he thought it "erroneous." Mr. Nielsen was completely exonerated from liability on all legal claims presented to the jury, and the factual implications which flowed of necessity from such exoneration barred one or more of the factual prerequisites for the equitable claims of *quantum meruit* and piercing the corporate veil. Furthermore, the equitable claims also were not established for a number of reasons independent of the bar of issue preclusion.

II. REVIEW ON CERTIORARI IS NOT APPROPRIATE IN THIS CASE.

Strikingly absent from Ag Services' Petition is any attempt whatsoever to justify the granting of a writ of certiorari of the decision other than to argue that the Court of Appeals erred. Unlike an appeal to a circuit court, a writ of certiorari is not a matter of right but of judicial discretion. Such a writ will only be granted for "compelling reasons." Sup. Ct. R. 10. Mere error by the lower court is not an adequate basis for its issuance.

Chief Justice Taft expressed the limited purposes of writs of certiorari as follows in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-393 (1923):

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4004.1 echoes Chief Justice Taft's statements:

> In most circumstances, the Supreme Court exercises its discretion on the assumption that it cannot function as an ordinary appellate court concerned with achieving justice in individual cases.

In Rule 10, this Court has set forth guidelines as to which cases may warrant a writ of certiorari. The instant case clearly does not meet these standards. Rule 10(a) advises that certiorari may be appropriate when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the "same important matter." However, Rule 10 also admonishes that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or mis-application of a properly stated rule of law."

In the Petition Ag Services asserts only that the Tenth Circuit "misapplied the law of Seventh Amendment based issue preclusion," not that it announced a new principle of federal law in conflict with the principles applied by itself or by other circuits. (*See Petition* at 7.)

Indeed, the principle of federal law stated by the Tenth Circuit, i.e., that the trial judge may not make findings contrary to "findings which are explicit or necessarily implied by the verdict" (*Petition Appendix A* at 10a), is not only entirely consistent with previous Tenth Circuit precedent (*see Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1442-3 (10th Cir. 1988) and *Butler v. Pollard*, 800 F.2d 223, 224-26 (10th Cir. 1986)), but is also consistent with the decisions of all other circuit courts which have considered the matter. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1098 (11th Cir. 1987); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 844 (7th Cir. 1978); *Therman-Tru Corporation v. Peachtree Doors, Inc.*, 44 F.3d 988, 995 (Fed. Cir. 1995); *In Re Lewis*, 845 F.2d 624, 630 (6th Cir. 1988); *Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d 184, 187 (8th Cir. 1959). In fact, Ag Services itself makes no argument that the Tenth Circuit improperly states this legal principle, instead arguing only that when applying it the Tenth Circuit discerned implied findings that do not flow of necessity from the verdict. (*Petition* at 14-18.)[2] The fact-bound inquiry as to whether the Tenth Circuit properly

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[2] At an early point in its Petition, Ag Services appears to argue that the Court of Appeals held that a trial court may not issue findings which conflict with implied factual issues that the jury may have *possibly* decided. (*Petition* at 6-7.) However, Ag Services seems to drop this argument later in the Petition. (*Petition* at 14-18.) In any event, it is clear from reading the opinion that the Court of Appeals did *not* hold that issues *possibly* decided by the verdict are binding, only those findings "which are explicit or necessarily implied by the verdict" create an issue preclusion. (*Petition Appendix A* at 10a. *Also see* 235 F.3d at fn. 1.)

applied settled Seventh Amendment law to the commercial lending case before it, while of great interest to the parties, is not an issue which warrants the grant of a writ of certiorari.

A basis for certiorari is also not found in the remainder of Rule 10(a). The Tenth Circuit did not decide "an important federal question in a way that conflicts with a decision by a state court of last resort." Instead, the only conflict Ag Services asserts between the Tenth Circuit opinion and New Mexico state court decisions is that, in this diversity case, the Tenth Circuit purportedly misapplied *state law* pertaining to *quantum meruit*, piercing the corporate veil, partnership by estoppel and improper preference. (*Petition* at 10-11, 19, 20-21.) However, alleged misapplications of applicable state law by federal courts is most decidedly *not* a proper basis for the issuance of a writ of certiorari. Even if the state law question is a fundamental ingredient of a federal statutory or constitutional question, this Court will generally not grant review to decide whether a United States Court of Appeals correctly applied state law. As stated in *Butner v. U.S.*, 440 U.S. 48, 52, 58-59 (1979):

> We did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law. . . . We decline to review the state law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Also see Haring v. Prosise, 462 U.S. 306, 314 n. 8 (1983) (a challenge to state-law determinations by a court of

appeals will rarely constitute an appropriate subject of Supreme Court review); *Commissioner v. Bosch's Estate*, 387 U.S. 456, 462 (1967) (Court will usually accept court of appeals determinations of state law).

The final provision of Rule 10(a) allows certiorari when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Ag Services makes no claim that the Tenth Circuit departed from its usual course of proceeding in any manner which would warrant Supreme Court intervention. Ag Services merely argues that in the usual course of the proceedings, the Tenth Circuit erred.

Finally, Rule 10(c) also allows certiorari in regard to court of appeals decisions which "determine an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." As before demonstrated, the principles of Seventh Amendment issue preclusion applied by the Tenth Circuit Court of Appeals are well accepted by all circuit courts which have considered them. Further, these principles grow out of and are consistent with this Court's decision in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990), which recognized the right to a jury determination of all issues common to legal and equitable claims, and in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 50 (1959) and *Dairy Queen v. Wood*, 369 U.S. 469 (1962), both of which recognized the primacy of the jury's determination of legal claims over the Court's determination of equitable claims. Indeed, Ag Services

does not argue that the Tenth Circuit decision directly contravenes these decisions, only that they did not mandate the action the Tenth Circuit took. (*Petition* at 17-18.)

Similarly, as pointed out above, the Tenth Circuit was proceeding on well-traveled ground when it held that issue preclusion was required as to "findings which are explicit or necessarily implied by the verdict," and this holding is entirely consistent with this Court's decisions in *Schiro v. Farley*, 510 U.S. 222 (1994), *Haring v. Prosise*, *supra*, and *Ashe v. Swenson*, 397 U.S. 436 (1970), which simply provides that if an issue was not necessarily determined there can be no preclusion. Again, Ag Services' argument is not that in this case the Court of Appeals has announced a new legal principle that contravenes this Court's precedent, but that the Court of Appeals determined that certain matters were necessarily decided by the jury which Ag Services contends were not. This is not a proper subject for certiorari.

III. THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF SEVENTH AMENDMENT ISSUE PRECLUSION TO REVERSE THE TRIAL COURT'S FINDINGS ON THE STATE LAW EQUITABLE CLAIMS OF *QUANTUM MERUIT* AND PIERCING THE CORPORATE VEIL.

The Tenth Circuit properly ruled that the findings necessarily implied by the jury verdict, particularly the finding that Mr. Nielsen had not directed, controlled, approved or ratified the activity that constituted a conversion, barred any claim based on *quantum meruit* (unjust enrichment) or piercing the corporate veil.

A. No Unjust Enrichment Was Shown.

To prevail on a *quantum meruit* or unjust enrichment claim in New Mexico, one must show that:

(1) another has been knowingly benefitted at one's expense

(2) in a manner such that allowance of the other to retain the benefit would be unjust.

Ontiveros Insulation Co., Inc. v. Sanchez, 3 P.3d 695, 2000-NMCA-51 (N.M. App. 2000). However, here, the jury specifically exonerated Mr. Nielsen of conversion and further, of necessity, determined that he had not directed, controlled, approved or ratified the activity by DHFC that led to the conversion.[3] Also, as the Court of Appeals pointed out, to the extent Mr. Nielsen himself received part of the potato sales proceeds, such receipt did no more than reimburse him for less than half of his contribution to the enterprise. (*Petition Appendix A* at 4a.) Under such circumstances, it is clear that Mr. Nielsen neither knowingly benefitted himself at Ag Services' expense nor did his retention of the funds he did receive create any injustice. The Court of Appeals properly pointed out that the creation of the corporation could not be tied to any improper purpose on Mr. Nielsen's part since the jury verdict found the only improper act taken

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[3] Ag Services' characterization of the implied jury finding as a finding that Mr. Nielsen did not "directly or actively participate in the tort" of conversion inaccurately reflects the jury instruction which required that the jury find Mr. Nielsen liable for the corporate conversion if they found that he "directed, controlled or ratified the activity that led to the conversion." (*Petition Appendix A* at 6a fn. 5.)

by the corporation was a conversion in which Mr. Nielsen did not participate. If Mr. Nielsen took no action to "direct, control or ratify the activity that led to" the corporate conversion, he could not have formed the corporation to impair Ag Services' security interest so as to further the conversion itself. Certainly, under the circumstances set forth, the only basis the trial court relied on for damages in unjust enrichment, which was that it was somehow "wrongful" for Mr. Nielsen to retain any potato proceeds, is completely undercut. (*See* Finding 36, *Petition Appendix C* at 38a.) Mr. Nielsen had every right to repay himself some of the money he had advanced to the venture since the receipt of a benefit which a party has already paid for is neither enrichment nor unjust. As stated in *Ontiveros, supra,* "[I]f a defendant has already *paid* for the benefit, there has been no enrichment, much less *unjust* enrichment." 3 P.3d at 700 (emphasis in original).

If a party has paid for a benefit, it makes no sense to punish the party for receiving it even if another party has not received a benefit for which it has paid. Such "limitations are premised on the bedrock principle that it makes little sense to remedy one wrong by inflicting another." *Ontiveros,* 3 P.3d at 699; *Sundance Mechanical & Utility Corp. v. Atlas,* 118 N.M. 250, 255, 880 P.2d 861 (1994) (if an owner has paid a general contractor for construction, the owner is not liable to an unpaid subcontractor even if the subcontractor has added value to the property by his work).

Ag Services also argues that perhaps the jury decided Mr. Nielsen was not responsible for a conversion on some technical ground such as a defect in the perfection of its

security interest or the subleasing of certain fields or that there had been a waiver of the security interest by Ag Services. The obvious fallacy in this argument is that such defenses would be defenses for DHFC as well as Mr. Nielsen, and since a judgment was entered against DHFC, such defenses clearly could not have been the basis for Mr. Nielsen's exoneration. Ag Services also argues that the statute of limitations could have been used by the jury to protect Mr. Nielsen but, as pointed out by the Court of Appeals in its Order on Rehearing, this could not lead to a conclusion that the statute of limitations was the sole basis for the general verdicts since DHFC was held to be liable. The Court of Appeals concluded, moreover, that even if limitations was partially relied on by the jury, such reliance could only be based on a determination that Mr. Nielsen must have acted properly so as to avoid being estopped from asserting limitations:

> Thus to the extent that the verdicts were based on limitations the jury must have found that DHFC, but not Nielsen, was estopped from relying on limitations, based on the instructions of the court. . . .
>
> If then, the verdict in favor of Nielsen is assumed, arguendo, to have been based on limitations, the jury under that hypothesis must have found that Nielsen did not engage in conduct which amounted to a false representation or concealment of material facts or conduct calculated to convey an impression that the facts were inconsistent with what he now asserts. We are persuaded that such an implied finding completely undercuts the trial court's basis for

> the findings that Nielsen had misused the corporate entity or otherwise committed conduct which made his 'enrichment' unjust.

(*Petition Appendix E* at 54a-55a.)

However, even if the verdict was partially based on limitations, the principles set forth in *Ontiveros* and *Sundance Mechanical & Utility Corp., supra,* would continue to act to bar a finding of unjust enrichment because it is undisputed that Mr. Nielsen merely received a benefit for which he had already paid.[4]

B. The Prerequisites for Piercing the Corporate Veil Were Not Established.

In order to pierce the corporate veil, New Mexico law requires that, first, the corporation must be shown to have been merely Mr. Nielsen's instrumentality and was dominated by him to further his individual purpose to such an extent that the identity of the corporation merged into him as his alter ego. *Scott Graphics, Inc. v. Mahoney,* 89 N.M. 208, 211, 549 P.2d 623, 626 (Ct. App. 1976). Second, it must be shown that the corporation was formed for an improper purpose and, third, there must be

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[4] It should also be pointed out that the applicable statute of limitations would also act to bar the equitable claims of *quantum meruit* and piercing the corporate veil. NMSA 1978, § 37-1-4 provides a four-year statute of limitations. The lawsuit was filed in November 1996. However, the "wrongful conduct" constituting the basis for the *quantum meruit* and piercing the corporate veil claims was the founding of the corporation purportedly for a "wrongful purpose," which occurred over four years earlier in February 1992. (*Petition* at 15.)

proof of proximate causation. *Harlow v. Fibron Corp.*, 100 N.M. 379, 382, 671 P.2d 40, 43 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983).

The Court of Appeals properly held that the requirement of an improper purpose had not been shown. Not only did the jury verdict inexorably lead to a conclusion that the corporation was not formed by Mr. Nielsen to convert Ag Services funds, but creating a corporation in order to isolate liabilities among separate entities is *not* a wrongful purpose. *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995) ("the law permits the incorporation of a business for the very purpose of isolating liabilities among separate entities"); *Anderson v. Abbott*, 321 U.S. 349, 361 (1944) ("[N]ormally, the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. . . . Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched and huge sums of capital attracted." Consequently, the mere fact that one reason Mr. Nielsen wanted to conduct the business in a corporate form was so he would not be personally liable for Mr Lundell's loans and other obligations does not qualify as the necessary improper purpose.

This is in contradistinction to cases where parties who themselves owe a pre-existing debt to a creditor form a corporation to evade payment. *See Anderson, Clayton & Co., Inc. v. Swallows*, 84 N.M. 486, 505 P.2d 431 (1973); *Seaside Indus., Inc. v. Cooper*, 766 S.W.2d 566, 569 (Tex. App. 1989). Here, Mr. Nielsen was never the debtor of Ag Services, and chose to do business in the corporate form partially to ensure that he would not become

ensnared in Mr. Lundell's individual debts. The situation is also inapposite to cases where an existing partnership incurs liability which the partners seek to avoid by the device of creating a corporation without advising creditors who continue to advance money in the belief they are lending money to a partnership. *Compare Inryco, Inc. v. CGR Bldg. Systems, Inc.*, 780 F.2d 879 (10th Cir. 1986). In this case there was no partnership and, as will be seen in Section IV, *infra*, Ag Services never lent money to Mr. Lundell in the belief a partnership existed and that Mr. Nielsen would be liable as a partner.

Further, although the Court of Appeals found it unnecessary to address the other two prerequisites to pierce the corporate veil, their absence also supports the Court of Appeals' decision. Certainly, the requisite domination and control were never shown. Mr. Nielsen was not even the owner of a majority of the stock much less one who had the kind of control required, i.e., "Not mere majority or complete stock control but complete domination, not only of finances, but of policy and business practice." *Garcia v. Coffman*, 124 N.M. 12, 16, 946 P.2d 216, 220 (Ct. App. 1997), quoting *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936). Certainly, any concept of absolute domination of DHFC by Mr. Nielsen is completely dispelled by the evidence that it was Mr. Lundell, not Mr. Nielsen, who had control of the finances of the corporation to such an extent that he could pay himself over $900,000 and it was Mr. Lundell, not Mr. Nielsen, who clearly was the party who engineered the corporate conversion. (*Petition Appendix A* at 14a.)

Additionally, the element of proximate cause did not exist. The only damages found by the jury to have been incurred by Ag Services were those caused by the corporation's conversion, an act in which Mr. Nielsen did not even participate. However, to pierce the corporate veil, "[T]he individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993). "[T]he fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege." 1 *Fletcher Cyclopedia of Corporations*, § 41.20 at 639.

IV. THE COURT OF APPEALS PROPERLY FOUND THE PREREQUISITES FOR THE EQUITABLE REMEDY OF PARTNERSHIP BY ESTOPPEL HAD NOT BEEN ESTABLISHED.

The Court of Appeals properly held that the prerequisites for partnership by estoppel had not been established. To show a partnership by estoppel it generally must be shown that a lender such as Ag Services believed it was lending money to a partnership and expected that a third party such as Mr. Nielsen would be liable on the note along with Mr. Lundell as his partner.[5] However, it

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[5] Ag Services mischaracterizes the Court of Appeals decision as holding that there was no partnership by estoppel "because Ag Services did not extend credit to a partnership entity." (*Petition* at 28.) However, the Court of Appeals correctly based its opinion, not on whether there actually *was* a

was unrebutted that Ag Services lent the money with no belief that a partnership existed and had no expectation that Mr. Nielsen was going to be responsible to pay the loan. (*Petition Appendix A* at 19a-20a.) Whether or not a partnership was named on the loan documents was not determinative; however, partnership by estoppel generally cannot exist without an expectation on the part of the lender that the defendant was going to be liable as a partner on the loan. Ag Services has never provided any authority to the effect that partnership by estoppel is available against any individual such as Mr. Nielsen who was merely involved in a business with a borrower. If a sophisticated lender such as Ag Services had wanted to bind Mr. Nielsen to the obligations imposed by its loan to Mr. Lundell, it should have asked him to sign a guaranty. However, it failed to do so and the Court of Appeals properly held that it could not create a guaranty through the device of a partnership by estoppel.

Another requisite for the establishment of a partnership by estoppel was also properly found to be lacking by the Court of Appeals as there was no evidence of any public representations of partnership to the general community prior to the advancement of credit by Ag Services. (*Petition Appendix A* at 23a.)

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partnership entity, but on whether Ag Services *thought* there was.

V. AG SERVICES' OTHER ASSERTED GROUNDS FOR A WRIT ARE WITHOUT MERIT.

A. There Was No Wrongful Preference.

Ag Services argues at pp. 18-19 of its Petition that the trial court's decision on the wrongful preference claim was valid. However, as properly pointed out by the Court of Appeals, no separate claim to recoup a wrongful preference was set forth in this case and the trial court did not base its ruling on this ground. (*Petition Appendix A* at 7a fn. 6.)[6] Therefore, the Court of Appeals properly stated that it did not need to address this issue further. The Petition simply ignores the fact that the Court of Appeals held there was no wrongful preference claim and continues to argue as if one actually existed.

To the extent the Court of Appeals considered the idea of a wrongful preference as an element of the unjust enrichment claim, it properly pointed out that a finding of wrongful preference is only appropriate when a corporate insider receives a preference to the detriment of a corporate creditor. (*Petition Appendix A* at 17a.) However, as pointed out by the Court of Appeals, Ag Services was not a corporate creditor; it was Mr. Lundell's creditor. Ag

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[6] In fact, a claim of wrongful preference is not an equitable claim but a legal one arising from the common law. *Smith v. Cox*, 113 N.M. 682, 684, 831 P.2d 981, 983 (1992) ("appellant contends that such preferential treatment gives rise to a common law cause of action. . . . We agree."). Consequently, if Ag Services had wished to have this issue determined, it should have been submitted to the jury. The trial court had no power to determine it.

Services argues that the trial court found that the corporation assumed Ag Services' advances to Mr. Lundell as its own business obligation. However, this is not the case. A review of the Findings cited by Ag Services shows *no* finding that the corporation accepted the Ag Services loan as its debt. At most, those Findings show that Mr. Lundell and Mr. Nielsen recognized the Lundell loan was a "business obligation" of Mr. Lundell's which would be repaid from crop proceeds. In fact, it is obvious that Messrs. Nielsen and Lundell did not advise Ag Services the loan was accepted as a corporate debt because the trial court found that Ag Services was not even aware of the corporation's existence. (*Petition Appendix A,* Findings 9-11, at 31a-32a.)

Ag Services also argues in the Petition that it was a creditor of DHFC because it later received a conversion judgment against it. This is a meritless bootstrap argument. Ag Services only became a creditor of DHFC *after* it received its judgment in 1998. At the time of the purported wrongful preference in 1992, DHFC was not a corporate creditor nor did it claim to be and a corporate officer could not be liable in a situation where no pre-existing creditor relationship had been established before the purported preference took place.

Additionally, the finding of a wrongful preference requires the insolvency of the corporation at the time of the preference. Although requested to so find by Ag Services, the trial court made no finding of insolvency and, indeed, there was no evidence of the kind of insolvency necessary for a wrongful preference, which is described as follows in 15A *Fletcher Cyclopedia of Corporations,* § 7472 at 273-274.

> Under the rule prohibiting preferences, a corporation is not insolvent, as a general rule, merely because it is embarrassed and cannot pay its debts as they become due, or because its assets, if sold, would not bring enough to pay all its liabilities, if it is still prosecuting its business in good faith with a reasonable prospect and expectation of continuing to do so.

B. Mr. Nielsen Did Not Waive His Seventh Amendment Rights to Assert Issue Preclusion.

Ag Services seems to argue that because Mr. Nielsen agreed that equitable claims are properly determined by the trial judge, he somehow waived his right to require that the trial judge's decision comport with the issues necessarily decided by the jury in determining the legal claims. Ag Services cites no authority for this remarkable proposition and none exists. A party should not have to contest the incontestable – that there is no right to have a jury decide an equitable claim – in order to preserve a constitutional right to require that the issues decided by a jury bind the trial court in the exercise of its equitable jurisdiction.

Nor is there any merit to Ag Services' argument that Seventh Amendment issue preclusion cannot be asserted unless special interrogatories are given to the jury pursuant to Fed. R. Civ. P. 49. In reality, many of the issue preclusion cases are ones in which only general verdicts were rendered, as a general verdict has preclusive effect on all issues necessarily determined. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d at 1094 ("[i]t is well settled that the court may not make findings contrary to or

inconsistent with the jury's resolution . . . of that same issue as *implicitly reflected in its general verdict,*" quoting *Craft v. Bd. of Trustees of Union of Illinois*, 793 F.2d 140, 143 (7th Cir. 1986) (emphasis added). *Also see Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d at 187; *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d at 1098 n. 4; *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d at 844; and *Robison v. Volkswagenwerk A G*, 56 F.3d 1268 (10th Cir. 1995). While it is true that if one submits detailed special interrogatories, but neglects to submit a special interrogatory on a specific issue, one waives a jury trial on that issue, this has no application because all legal issues, to-wit: conversion, negligent misrepresentation and fraud, were submitted to the jury; therefore, there was no waiver.

C. The Verdict Was Appealable by Ag Services.

Ag Services makes the unique argument that Seventh Amendment issue preclusion should not apply because it never had the opportunity to appeal or otherwise contest the verdict. This is not true. Clearly, the verdict was adverse to Ag Services because it only gave it a partial judgment against a then defunct corporation and found in favor of Mr. Nielsen – the only defendant who might be able to satisfy a judgment. Nothing prevented Ag Services from filing a motion asking for relief in the form of a new trial. Nor would Ag Services have been prevented from moving for a judgment as a matter of law prior to the entry of the verdict and renewing such motion if necessary after the verdict was entered.

It also was obvious, both in the argument to the trial judge and in post-trial briefing, that Mr. Nielsen was

taking the position that the verdict was a bar to the court entering judgment against Mr. Nielsen on the equitable claims. In light of this, Ag Services could have taken the precautionary measure of filing a cross-appeal pursuant to Fed. R. App. P. 4(a)(3) in order to attempt to invalidate the verdict so as to avoid the imposition of any issue preclusion. However, Ag Services made the strategic decision not to take any of these actions. Having failed to act to take the avenues open to it in order to attempt to avoid any preclusion of issues based on the jury verdict, Ag Services should not now be allowed to complain that such preclusion is "manifestly unfair."

Further, this argument was never made to the Court of Appeals and is made for the first time here. This Court has repeatedly ruled that it will not consider an issue not raised in the lower courts. *Rogers v. Lodge*, 458 U.S. 613, 628 n. 10 (1982); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n. 6 (1983); *Kosak v. U.S.*, 465 U.S. 848, 850 n. 3 (1984).

CONCLUSION

For the foregoing reasons, Respondent asks that this Court deny Ag Services' Petition for Writ of Certiorari.

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